ACCIDENT INSURANCE CLAIMS

The Law and Practice Relating Thereto

BY

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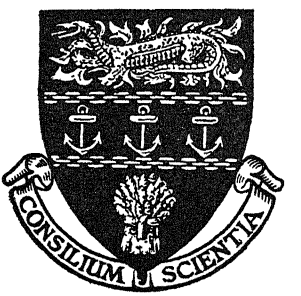

INSURANCE HANDBOOK No. 1

This Handbook is issued under the authority of THE CHARTERED INSURANCE INSTITUTE and is designed specially for the use of students.

PREFACE

THIS book, though intended for students who are preparing for the examinations of The Chartered Insurance Institute, does not fully cover the syllabus.

Physiology and anatomy have not been dealt with. There is already an excellent book on this subject by a well-known author, and it is hardly a subject on which a layman should venture.

Workmen's compensation claims have also been omitted. The companies have lost the statutory portion of this business and though the common law liability which remains with the employer will be the basis of a considerable volume of business it has been thought well to omit any special reference to this. A new practice and procedure will no doubt arise.

Subject to this the book covers the syllabus and I have thought it better to go somewhat beyond the topics therein set out so as to try and provide a comprehensive treatment of the subject.

Considerations of space compel the treatment, especially of the law, to be but summary and the student is advised to supplement the information from other sources.

I have had the help of many friends and former colleagues and to them I tender my grateful thanks.

J.B.W.

December, 1948

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CHAPTER I

GENERAL CLAIMS PROCEDURE

THE organization and work of the Claims Department will naturally differ according to whether it is in a head office concerned mainly with the control and direction of the work done at the branches, or whether it is in a branch office where the claims are actually handled. The arrangements will also vary according to the practice of individual companies as to the "settling" power conferred on their local officials. One company will allow a branch a very wide discretion, while in another case all claims except the very small ones have to be referred to head office for authorization.

Whichever is the practice adopted, the branch has the benefit of the wider experience of the head office which sees the claims from all branches and can lay down the policy which is to be adopted in claims matters. At the same time, local knowledge is essential for successful claims work, and these matters are best handled by the local men with the occasional help of a guiding hand from head office.

A recent development is the Claims Bureau which has been set up by some composite offices, whereby the claims of all the companies in the group in a certain district are handled by one organization.

It is claimed for this scheme that thereby a considerable saving of expense is effected and the claims are more expeditously and expertly handled, and while there is a feeling on the part of many branch managers that they suffer by having these matters taken out of their hands, so losing the valuable contact which a generous settlement affords, this can be avoided and the value of the settlement retained; and undoubtedly the Bureau does tend to efficiency and economy.

The difference between a head office claims department and that of a branch is only a matter of degree, and as most head office claims departments deal with the claims arising from the head office or city branch business, to that extent their work is identical.

It is impossible to dogmatize on such a subject as this. There is no ideal system. Every company has its own way of doing things which from experience it has found suits it best. They are all good though perhaps some are better than others. Each company has its own pet fancies, and long may it continue so.

All that can be done here is to offer some general observations which may be of service to the student.

Where the claims department should be located is a thorny question. The accident department, having arrived late on the scene, has generally found the best quarters occupied by the other departments and has often been relegated to the fourth floor back or even further away, but there is one point which should never be overlooked and that is the provision of adequate private rooms for interviews.

It is, of course, not possible nor even perhaps desirable to provide every official with a private room, but at the same time it should be possible to avoid the necessity of having to discuss a claim or take a statement from a driver at the counter. Even a glass partition will be found to expedite such matters.

Beyond this we need not go except to say that comfortable and quiet quarters are very necessary for the efficient handling of claims. Claims present many problems which need careful and calm consideration.

STAFF

The staff will consist of the sectional heads, clerical staff and inspectors, and there may be a claims manager, but in all probability the department will come under the direct control of the accident manager. It is very unwise to divorce claims from underwriting. The underwriting men should have an opportunity of seeing any claim file which presents any feature out of the ordinary. It is not sufficient that undesirable risks which are brought to light by claims should be reported to them; they should have the opportunity of using the claims as a guide to their underwriting practice.

There should be the closest liaison between the two departments and periodical interchange of staff. To make a good underwriter, knowledge of claims work is necessary, and the converse is also true. Every claims man should have had experience of the underwriting side.

In the same way, it is very desirable that all the staff should be given experience of both inside and outside work. A man who has had to go out and do the actual investigation and negotiation of claims on the spot is better fitted for indoor claims work.

There is obviously an amount of routine work which has to be done, but this will be greatly reduced by the cessation of workmen's compensation business and the claims of the other classes, though they have to be recorded, indexed, tabulated and classified, practically all present an individual problem.

Whereas in a small department one or two men may have to deal with the claims of all sections, in large departments it is necessary

to sectionalize the work; and it will probably be found that those claims which have something in common will be grouped together, as for example motor, third party, and drivers. On the other hand two very distinct classes will sometimes be found grouped together for the simple reason that individually they do not justify a separate section.

Here again, too rigid a division is to be deprecated and an interchange of staff from time to time is desirable. A man will find his experience of the claims of one class very useful when dealing with those of another. The problem is whether to train experts or all-round men. The arguments on either side need not be stated; suffice it to say that experience even of claims of a very different character often comes in very useful, especially when outside. The matter tends to sort itself out—men develop a flair for a certain kind of work and it is not difficult to fit the right man into the right job.

RECORDS

Every notice of claim should be recorded and given a number as soon as it is received. On no account should the matter be dealt with or the papers handed over for investigation until this is done.

It is surprising, but all the same true, how papers can go astray even in the best run offices. If there is an entry of every notification, then it is possible to make a check which will reveal missing cases.

Whether the recording should be in bound registers or in loose-leaf books is a matter of personal preference, but whichever method is adopted payments should be posted (and possibly other information) so that there is some record other than the file of papers as to the position of the case.

On receipt of a notification of claim the procedure should be somewhat on these lines—

(1) Enter in register and allocate Claim No.

(2) Check that the policy is in force.

(3) Prepare facing paper with information as to the policy cover. This will vary according to the class of risk. In the case of an " all risks " policy it may be necessary to list all the items covered. It is not always well to attach the original proposal documents, at any rate at this early stage. In other cases the particulars can be very brief, but it is as well not to paraphrase special policy wordings but to follow the exact wording. It is these words, and not any other words which may have replaced them in a more modern form of policy, which decide the question of liability; but it is the practice to give the insured the benefit of up-to-date policy forms particularly when the premium remains the same. A careful note should be made

of any endorsements or restrictions or extensions from the usual cover. Reinsurance should be noted.

(4) Pass the papers on for attention. This will probably mean the despatch of a claim form and the arranging of a call by a claims inspector.

In many offices a bag or folder is prepared to contain the file and the facing paper is often on the front of the bag or folder.

It is not necessary to prepare a folder or bag (apart from the facing paper) for every claim. It is perhaps better to wait and bag the files if and when they get bulky. In the same way it is necessary to graduate from a pin to a paper fastener as the file grows.

It is not good practice to use the claim form as a facing paper and the place for notes and memoranda, at least until the case is disposed of. The claim form may have to be produced, and the notes may be embarrassing, to say the least of it.

It is surprising how often these claim forms are a long time in coming back. True, the policyholder is bound by the conditions of his policy and if he neglects to return the form he possibly puts himself out of court by not returning the form, but it is wise not to let the matter rest and a reminder should be sent.

The question whether the claim should be handed to an assessor or dealt with by the company's officials does not arise. The practice is that all claims except some burglary cases are dealt with by the company's officials. It is, however, frequently necessary to obtain professional assistance in the form of medical examination, inspections by engineers, reports from accountants, and so on.

The investigation, and often the negotiation and settlement, of the claim are the work of the claims inspectors. The position is one of great responsibility, and it may be said that the reputation of the company is in the hands of its claims inspectors. To set out the qualifications for such a position is unnecessary here, but it may be stated that the golden rule in handling inspectors is to give them full support. Even if the line taken is not quite what *you* would have done, support the inspector. You may tell him you do not quite agree, but never tell anyone else and give him the fullest possible authority. You will find that, by and large, though perhaps not in every individual case, his settlements are well within the limits you would have given him.

There is one point which cannot be stressed too strongly; the need for prompt attention to all claims.

Delay tends to develop a claimant's ideas, especially in the case of third party personal injury claims, and it is very desirable to get in touch promptly. In the case of a burglary claim the premises are usually left by the thief in great disorder and the insured is naturally

anxious to clear up and repair, and he is generally in a sufficiently agitated state of mind without being further upset by waiting for the inspector's visit. Every motorist wants to get his car back on the road with the least possible delay; and so on through every section. Promptitude is essential.

SETTLEMENT OF CLAIMS

All payments should be by cheque—the old days of taking a bag of sovereigns to tempt claimants have long since gone, and there should be a strict system of authorization for the drawing of cheques. All receipts should be taken on the back of the cheques, and it is quite possible to take an adequate discharge on the cheque. The old elaborate forms of discharge are now rapidly disappearing, and so is the objectionable practice of asking for the receipt in full discharge before handing over the cheque.

Payments on account should not be made except in very exceptional circumstances. These are sometimes asked for in personal accident claims and are to be avoided if possible as the company is apt not to get full credit for these payments when it comes to a final settlement.

This has no reference to those cases where it is necessary to pay various parties, e.g. a motor claim where there may be separate payments to a garage for repairs, a hospital for emergency treatment, a third party for damages, an insured for personal accident benefits, and so on.

It is necessary to distinguish clearly between payments in current and running off claims.

A good deal of the investigation and negotiation will be done by correspondence and a good letter writer is a pearl of great price. The claim reference should always be quoted, and if it is a simple one your correspondent may reasonably be expected to quote it in his reply, but it can hardly be expected that the headings which are sometimes used will be repeated. A simple reference which will serve to put one on the track of the file is all that is necessary. A reference containing the number, the class, the branch, the year and the names of the policyholder and the injured party is rather overdoing it.

The use of technical phrases and insurance jargon should be avoided. To write and tell a man that his claim must be turned down may be explicit but it certainly is not polite. It is not very useful to tell a man that something cannot be done because it is contrary to the office practice (a statement which seems to be peculiarly prevalent). Your correspondent is not much concerned with your office practice;

his concern is with his contractual rights and perhaps the company's generous interpretation of them.

Simplicity should be the characteristic of all good claims letters and this applies equally to inspectors' reports and reports of office interviews and telephone conversations.

They should be brief and in summary form and as far as possible in the words of the claimant or other person interviewed, with perhaps an opinion appended, but the important thing is to give the actual words used, as far as possible.

Much of the information in a claim file should be treated as confidential. The greatest care must be exercised in conducting correspondence to ensure that no ill-advised comment or suggestion is allowed to creep in.

Letters from head office sometimes contain comments of a domestic nature, and before passing the file out of the office, even to the company's solicitors, any correspondence which might be regarded as more or less private between head office and branch should be detached.

A note of the estimate provided for the claim should never be placed on paper where it may be read by a casual observer.

It may be desirable to mark correspondence " without prejudice." This expression means without prejudice to the legal interests involved which are reserved either for future discussion or for eventual decision by litigation. Interviews held on this understanding or correspondence so marked cannot be quoted in subsequent proceedings (*La Roche* v. *Armstrong*, [1922] 1 K.B. 485) and thus it is possible to negotiate freely without being hampered by the necessity of making inconvenient admissions or by the knowledge that statements or offers may eventually be used to one's disadvantage.

The question sometimes arises as to what should be done if a letter which should have been so marked has been despatched without these words being added. The point, however, gives rise to no difficulty, as one letter so marked in a series of letters protects the whole correspondence.

There should be a definite system of going through the claim files periodically to see if any reminder is required or other action is necessary. If there are too many for this to be done at one time, then a certain number should be examined each day. It is essential that every claim should be reviewed at least every ten days.

A diary is a very useful aid in this matter. When any step is taken that calls for a reply a few days hence, or when any future action is decided upon, a note should be made on the day to see that the reply has come in or that the further action is taken.

A diary is, however, useless and, in fact, a positive danger unless it is referred to daily.

The system of dealing with recoveries arising from reinsurance sharing agreements, subrogation rights or excesses and franchises varies. Very often these matters are all grouped together in one section, but the important thing is to see that nothing is overlooked.

The claim papers can be destroyed after a certain number of years, and there should be a regular routine for going through the old files and sending those ready for destruction for pulping. Care should be taken that discharges where a substantial payment has been made in compromise of High Court or County Court proceedings, or where an infant is involved or there is an indemnity, are not prematurely destroyed.

It is a useful plan when filing settled claims to mark the papers " Destroy after 19....." or "Retain." It is easier to make the decision when the case is fresh in your mind rather than to make it after reading through old files. The bags or folders are probably capable of being used again. Care should be taken to obtain the usual guarantee that everything sent for destruction will be pulped.

REPUDIATION OF LIABILITY

The position of the official who has to deny liability in respect of a claim is a delicate one, and such a matter requires very careful handling, for if he says anything which amounts to a statement that the policy is void the insured can then bring an action against the office and is not bound by the condition as to arbitration. In other words, a company avers that the policy is void and at the same time seeks to take advantage of its conditions.

The position is well illustrated by the case of *Woodall* v. *Pearl Assurance Co. Ltd.*, [1919] 1 K.B. 593. There the decisive question was one of mixed fact and law, being the construction to be put upon what was said by C., the representative of the insurance company when he interviewed the solicitors of the plaintiff, who was making a claim on an accident policy. The arbitration clause in the policy was as follows: " If any question shall arise touching this policy or the liability of the company thereunder or the extent or nature of such liability . . . then the assured . . . shall be bound, if the company shall so require, to refer the same to arbitration . . . and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration." The Court of Appeal held that under this clause the right to bring an action

depended on the result of the arbitration, as in *Scott* v. *Avery* (1856), 5 H.L. Cas. 811. The company took up the position that the assured had misstated his occupation, and the question was whether they were averring that the contract was void, or were they insisting upon arbitration in order that the alleged misstatement might be adjudicated upon, while at the same time indicating that, if the arbitration resulted in their favour, the policy would be avoided. What happened, therefore, at the interview was the decisive factor. The evidence consisted in C's evidence, and partly in a note which C used, but was not a note of the interview, but a document which he prepared to assist him at the interview. The material part of C's evidence was this: " I was reading from my note, and my note refers to it." The note was produced at the trial of the action, and was as follows: " Policy void by misdescription, misstatement of material fact. Alternatively, void from change of occupation. In any event, require arbitration under clause II." The governing words of this note as it appeared to Lord Justice Bankes, were "Arbitration in any event"; that is, " Our first point is misdescription, our second is change of occupation, but in any event arbitration." " When C. made the note, baldly stating that clause II required arbitration, it was a hint to himself to remember that, whatever else he said, he must remember to be careful to claim arbitration on behalf of the company." On this evidence, mainly, the Court of Appeal held that the company were not seeking to avoid the contract, but were insisting on a term of the contract—namely, the right to compel the plaintiff to go to arbitration. The plaintiff therefore failed to bring herself within the principle of *Jureidini* v. *National British and Irish Millers' Insurance Co. Ltd.*, [1915] A.C. at p. 505; 112 L.T. 531—namely, that where there is a repudiation which goes to the substance of the whole contract the party setting up that repudiation cannot insist on a subordinate term of the contract still being enforced. The case was held to be nearer to *Stebbing* v. *Liverpool and London and Globe Insurance Co. Ltd.* (1917), 117 L.T. 247, where it was decided that the insurance company was not seeking to avoid a policy but was relying upon a provision contained in it to the effect that the truth of the answers in the proposal should be the basis of the contract.

These cases were reviewed by the House of Lords in *Heyman* v. *Darwins*, Ltd., [1942] A.C. 356; 1 All E.R. 337, and the principle illustrated by Woodall's case confirmed. The case of *Toller* v. *Law Accident Insurance Co. Ltd.*, [1936] 2 All E.R. 952, is an example of repudiation of the policy as distinct from repudiation of liability under the policy.

Despite the condition in a policy which entitles the company to assume absolute conduct and control of all claims and proceedings, it is very desirable that the insured should be kept acquainted with developments and that no admission of liability should be made without first consulting him. This was emphasized by the case of *Groom* v. *Crocker and Ors.*, [1938] 2 All E.R. 394, which laid down that insurers cannot admit that their insured has been negligent contrary to fact without their solicitors and possibly themselves incurring a liability for breach of duty and libel.

That the treatment of claims should be fair and in fact generous goes without saying. It is generally better and often cheaper to pay than to fight. It is true that this means that the company may sometimes pay when it need not have done so, but these cases are very few. Fraudulent claimants are not often met with, and unless the case is a very bad one and the amount involved is considerable, the saving of the time and money which would be expended in a fight more than justifies the disposal of the matter.

Always remember that the claimant may have suffered a lot for which he cannot be compensated. A man who has had his house ransacked can be paid the value of the property stolen, and you cannot recompense him for all the annoyance and inconvenience he has suffered; but an understanding and generous treatment of his claim does help. He will appreciate it and it is good for business.

CHAPTER II

THE CONTRACT OF INSURANCE

IT is usual for the policy in its conditions to deal with the principles of the common law. In so doing the conditions may extend or modify the common law, and it becomes necessary to construe the actual policy wording. All that can be done in this chapter is to deal with general principles, but it must be remembered that their application will in many instances be determined by the wording of the policy.

CONTRACT UBERRIMAE FIDEI

All contracts of insurance are contracts *uberrimae fidei*—that is, every material fact is to be disclosed. The rule is well expressed in Section 17 of the Marine Insurance Act, 1906, as follows—"A contract of marine insurance is a contract based on the utmost good faith and if the utmost good faith be not observed by either party the contract may be avoided by the other party." This may be taken as a definition of the principle as it applies to all classes of accident insurance.

It is to be observed that the obligation is on both the insured and the company. It is a common law duty and not a contractual duty, and its extent depends upon general principles and not upon the terms of the particular policy. The duty of the proposer during the preliminary negotiations is to make full disclosure of all material facts and this duty is not limited to answering the questions in the proposal form. These questions generally cover the ground fairly thoroughly but it might be an advantage to include a general question asking if there are any further facts which should be disclosed. It would at any rate draw the attention of the proposer to his obligation and prevent him being lulled into a false view of his duty, as a long and inquisitorial proposal form is apt to do.

The test of materiality (apart from policy conditions) is the effect which the knowledge of the fact if disclosed would have upon the mind of a prudent underwriter. The fact must affect the risk; a fact which has no bearing on the risk need not be disclosed.

Materiality is as a general rule a mixed question of law and fact. Any fact is material which relates to the physical hazard or the moral hazard, such as information as to previous insurance history or claims experience.

There is no general duty to disclose claims in respect of every policy which the insured may have had during his life, nor former declinatures in respect of another kind of insurance.

Materiality is a question of fact, not of belief or opinion. The duty is not discharged by a full and frank disclosure of what the proposer thinks is material, but must go further and disclose every fact which a reasonable man would have thought material. If, however, the fact though material is one which he did not and could not in the particular circumstances have been expected to know, or its materiality would not have been apparent to a reasonable man, his failure to disclose is not a breach of duty.

The materiality of a particular fact is determined by the circumstances existing at the time when it ought to have been disclosed and not by the result.

The duty of good faith applies throughout the negotiations for the insurance, and the statement about the material facts must not be misleading. It is sufficient, however, that the statement is substantially accurate, an unimportant misstatement or the omission of trifling details is disregarded.

As the duty to disclose is limited to facts within the knowledge of the proposer or facts which he ought to know, a mistaken statement about a material fact made honestly and with belief in its truth will not affect the validity of the policy unless there is an express condition that it shall do so. In the absence of such a condition, the company must prove fraud before it can avoid the policy. The right to avoid the policy for misrepresentation does not depend upon any implied term.

The duty of disclosure comes to an end when the contract is complete, and material facts which come to the knowledge of the insured subsequently need not be disclosed; but the duty remains so long as negotiations continue and a new fact may arise or a fact which was previously immaterial may become material.

The same duty applies to statements made during the negotiations—if they are discovered to be untrue they must be corrected.

Statements of intention are representations only and if honestly made a change of intention after the contract is complete does not affect the validity of the policy. If, however, before the contract is complete the insured changes his intention, it is his duty to correct his statement, otherwise the representation becomes fraudulent and the contract may be avoided.

The company is equally subject to the duty of good faith, and every care must be taken to see that the policy contains all that is promised in the prospectus.

It is, however, the usual practice to introduce an express condition into the policy relating to disclosure and providing for avoidance in the event of non-disclosure. As a general rule this varies the common law duty either by extending or restricting it, and makes the duty contractual. In such a case a failure to disclose is a breach of contract rendering the policy voidable. The question as to whether the insured has committed a breach of contract or not, depends upon the wording of the condition.

Often an express condition extends the duty by making the validity of the policy depend upon the accuracy of all statements made during the negotiations. Under such a condition it is unnecessary to enquire whether the statement was a fraudulent misrepresentation or was made innocently. The insured has warranted its truth and if it is inaccurate the warranty is broken and the policy voidable. Unless the condition is limited to material misstatements, the question of materiality does not arise and the policy is voidable even by an immaterial misstatement.

INSURABLE INTEREST

The policy requires an insurable interest in the subject matter to support it. In the absence of insurable interest the insured can suffer no loss and the contract becomes a mere wager.

The precise nature of the interest is immaterial. An equitable or beneficial interest of any kind is insurable equally with a legal interest. Interest is not restricted to ownership. It may arise under a contract or it may be founded upon possession. A finder who takes the object he finds into possession has an insurable interest in it. A defeasible interest is capable of supporting an insurance.

Interests Capable of Being Insured. All kinds of ownership, whether legal or equitable, are sufficient to give an insurable interest. The vendor of any property retains his insurable interest as owner until the property is conveyed to the purchaser. A bankrupt, so long as he remains in possession of any of his property, retains an insurable interest, and it is immaterial that the property is being fraudulently concealed from his creditors.

A husband has an insurable interest in his wife's property so long as they are living together and sharing its use.

A person who, by the terms of a contract with the owner of property, undertakes responsibility for its safety has an insurable interest in it. Thus a tenant who has covenanted to insure the demised premises retains an insurable interest in the premises even after his tenancy has ceased if his liability under the covenant continues.

An insurance company, by reason of its liability under a policy, has an insurable interest in the subject matter of the insurance.

The existence of liability to the owner is not essential. It is sufficient that the contract confers advantages which will be lost by the destruction of the property.

A tenant who is under covenant to insure or to make good any damage has from the mere fact of such liability an insurable interest. He has also an insurable interest founded upon the beneficial enjoyment of the premises which he loses in the event of their damage.

Insurance of Different Interests. In many cases two or more persons, such as landlord and tenant, bailor and bailee, mortgagor and mortgagee, tenant for life and remainderman have each an interest in the same property. These interests are separate and distinct. Each is capable of supporting an insurance and each person may effect an insurance upon the property for his own protection. Such insurance enures for the sole benefit of the person effecting it, and the other persons interested in the property have no right to participate.

The usual way is for the policy to be taken out in the names of all the parties. It is not necessary that the person effecting the insurance should owe any duty or responsibility to the other persons interested. All that is necessary is that at the time of insuring it was his intention to cover their interests as well as his own. The person effecting it is to be regarded as doing so as agent on their behalf. If, therefore, it is unauthorized it must be ratified by the person claiming the benefit of it but the ratification may be given after the loss has occurred.

A person who himself has no insurable interest in the property may insure it on behalf of some person who has an interest. In this case if ratification is necessary it must be given before the loss occurs.

Assignment of Interest. Upon the death or bankruptcy of the insured his insurable interest is assigned by operation of law to his personal representative or trustee in bankruptcy, and the policy is enforceable by them as the case may be.

When the assignment of interest in the subject matter is by the voluntary act of the insured he by his act divests himself of his interest in the subject matter and the policy must be separately assigned to remain effective.

The insured must part with all his interest in order to constitute an assignment. So long as he retains any interest the assignment is not complete and the policy remains effective. In the case of a sale, if the property has passed and the price paid, the vendor's interest ceases. On the other hand the mere fact that a contract of sale has been entered into does not divest the vendor of his interest

even though, as between himself and the purchaser, the risk has passed to the purchaser. The vendor retains an interest as owner and has a further interest in that the purchaser may refuse to complete. If a loss takes place before completion and/or the price is paid the vendor has a good claim. It is no defence that the vendor will suffer no loss when the purchase is completed.

A change of interest is not equivalent to an assignment. The creation of a mortgage or a charge does not operate as an assignment.

A policy of insurance is a contract personal to the insured. It is not connected with his property. When the subject matter is assigned the policy does not pass to the assignee by virtue of such assignment—it must be separately assigned. There cannot be an assignment by the mere handing over of the policy.

To constitute a valid assignment of a policy the following conditions must be fulfilled—

(1) The assignment of the policy must accompany the assignment of the property.

(2) The consent of the company to the assignment must be obtained. The assignment is in effect the substitution of a new insured, and the contract is purely a personal contract between the company and a particular insured.

(3) The consent must be signified in the form prescribed by the policy—this is usually by endorsement.

A distinction must be drawn between the assignment of the policy and an assignment of the insured's right to the policy moneys, which is an assignment, not of the contract of insurance, but of the debt arising under the contract.

DESCRIPTION OF INTEREST

Unless the policy so requires it is unnecessary for the Insured to describe the nature or extent of his interest. Such a requirement applies to insurances by bailees, and goods held in trust or on commission must be specially mentioned, but this has no application unless the bailee intends to cover the interest of the bailor as well as his own.

The expression "goods in trust" does not imply the existence of a trust in the strict sense, but rather means goods entrusted to the insured.

The expression " goods held on commission " refers to goods in the hands of the insured for the purposes of sale. In practice it is limited to goods for which the insured is responsible for their safety to the bailor. If there is no such limitation the insured is entitled to recover irrespective of whether he was or was not responsible.

PROPOSAL FORM

A form of proposal is required in all classes of accident business and the insured, in filling up the form, is carrying out his duty of disclosure. Both the question and the answer must be given a fair and reasonable construction. Substantial accuracy in the answer is all that is required, and an immaterial misstatement or omission does not affect the position unless the answers are warranted true in the declaration. A deliberate misstatement of the name has been held to be fraudulent, and an alien who insures under an English name or a wife who insures under her maiden name may be guilty of concealment if the misnomer is material. On the other hand a mere slip in a christian name may be disregarded. The same applies to the address. The description of the occupation has been treated with latitude, but if the insured follows several occupations he must state them all unless the premium is unaffected. In a proposal for insurance of business premises the proposer need not disclose the previous insurance record of his private insurances.

An answer may be clearly inaccurate, such as a statement contrary to fact or one which, while literally true, may be rendered inaccurate by the omission of a material particular as, for instance, where the proposer says he has made one previous claim whereas he has made two.

A hesitating or unsatisfactory answer which is incomplete or inconsistent on the face of it, puts the company on enquiry and if it issues the policy without enquiry it waives any further information. An unqualified negative is an assertion that the proposer has the knowledge which he purports to impart and that that knowledge is what he is imparting. It does not mean to the best of his knowledge and belief.

Where the space for the answer is left blank, the inference is that there is nothing to disclose. Even if a correct answer would have disclosed a material fact, the proposer may not be guilty of misrepresentation since he has not made any inaccurate statement, but he is guilty of non-disclosure. The issue of the policy is not a waiver of the non-disclosure because the company was not put upon enquiry.

The proposal form usually contains a declaration making the truth of the answers a condition precedent to the validity of the policy, and it is accordingly rendered voidable by an inaccuracy even in an immaterial detail.

Agent's Position. When the proposal is received through an agent it becomes necessary to consider how far the agent's knowledge of the truth is to be imputed to the company.

Before any question of imputed knowledge can arise it must be established that the person was acting as an agent of the company in the matter and that it was his duty as its agent to place the knowledge, however acquired, at their disposal. It would be difficult to maintain that this was the position so far as regards the present day agents of the composite offices.

In practice the proposal form is frequently filled up by the agent. In filling up the proposal form the agent ceases to act as agent of the company and becomes the agent of the proposer—even if he knows the truth, his knowledge is not to be imputed to the company. Apart from this, however, the proposer by signing the proposal form adopts the answers and makes them his own, and this is equally so if he signs the form without reading them. There may be a condition excluding the application of this doctrine of imputed knowledge.

COMPLETION OF CONTRACT

To constitute a contract of insurance there must be complete agreement to all its terms. So long as negotiations continue there can be no contract. When a proposal form is signed, the proposer by signing it makes his offer, and upon the acceptance by the company there is at once a contract binding the company to issue and the proposer to accept a policy in accordance with the proposal, and the company cannot afterwards vary its acceptance by issuing a policy containing different terms.

Until acceptance the company is not bound and is at liberty to introduce fresh terms constituting a counter offer which the proposer must in turn accept before there is a binding contract.

Where there is no formal acceptance, the issue of the policy in accordance with the proposal is conclusive, but the issue of a policy which introduces a fresh term is not an acceptance but a counter offer. The receipt of the premium may show acceptance of the proposal and bind the company to issue a policy.

COVER NOTE

Cover may be given informally. Verbal cover is sufficient. Though the cover note is superseded by the policy, the rights and liabilities in respect of a claim happening during its currency are governed by the terms of the cover note and not by the terms of the policy unless they are expressly incorporated in the cover note.

If made subject to the terms of the standard policy it will affect the proposer with notice provided he is permitted an opportunity of learning what the conditions are.

THE POLICY

There is no statutory requirement that a contract of accident insurance in order to be binding shall be expressed in a formal policy. A parol contract of insurance is valid, but if the contract is for more than a year it must be evidenced in writing (Statute of Frauds, 1677), and Section 100 of the Stamp Act, 1891, provides that a stamped policy must be executed within one month of the receipt of the premium. Any document containing the terms of the insurance may be regarded as a policy. In practice, however, formal documents are used and in many cases the form is standard.

Operative Words. The operative words are preceded by recitals. The operative words prevail over a recital but if there is an ambiguity in the operative words the recital may be referred to for the purpose of ascertaining the correct meaning.

Construction of Policy. The policy is subject to the same rules of construction as other written contracts, the paramount rule being that the intention of the parties as expressed in the policy shall prevail. A liberal construction leading to a result manifestly contrary to the real intention, is to be avoided and a reasonable construction adopted as far as possible, and this applies whenever there is any ambiguity. In the case of ambiguity recourse may also be had to the principle that a written document shall be construed against the maker. The policy is drawn up by the company and it is for it to express its meaning in clear language. Consequently any ambiguity is resolved against the company.

There is, however, no ambiguity unless there is a real doubt as to the meaning. The principle must not be applied for the purpose of creating a doubt but only for the purpose of removing one, as for instance when the words used are capable of two different meanings and it is impossible to decide which is the right one. It is not for the Court to make for the parties a reasonable contract which they have not made for themselves. Effect must be given to the words used if plain, however unreasonable the result may be.

The policy includes both the printed words and the written words, and in the event of any inconsistency or repugnancy between the printed and the written words, the written words prevail.

The terms of the policy cannot be varied or contradicted by parol evidence, but parol evidence is admissible to explain latent ambiguities and generally to prove the surrounding circumstances in order to apply the contract to the facts which the parties had in mind and about which they were negotiating. Parol evidence is also admissible to supplement the written terms by adding a trade usage, or to explain technical words or ordinary words if capable of a technical meaning.

The general rules for construing a policy are—

(1) Words are to be construed in their plain ordinary and popular meaning but not in their strictly philosophical and scientific meaning. For instance, "building" does not include stained glass. Nor is an expression such as "die by his own hands" to be taken literally.

(2) Legal terms are given their strict legal meaning unless a contrary intention appears.

(3) The meaning of a word may be controlled by its context.

(4) Words of general signification may be limited in meaning by the application of the *ejusdem generis* rule, that is they may include only things *ejusdem generis* with those which have been specifically mentioned before.

(5) Grammatical construction must be followed as far as possible, but if the intention of the parties as disclosed in the policy read as a whole would then be defeated, the grammatical construction must give way.

(6) Clerical errors may be disregarded.

Conditions. The policy, though unilateral in form, is nevertheless a contract between the parties and its terms are binding on the insured, who cannot enforce the policy unless he himself has performed the conditions.

If conditions have been introduced which were not agreed to and have not been accepted by the insured, he may decline to be bound by them and may take steps to have the policy rectified. Otherwise if he seeks to enforce the policy he affirms it to be the contract. He cannot repudiate any of the terms as not binding on him—he must take it as a whole. If, however, the insured has agreed in the declaration in the proposal form to take the usual form of policy, no question of rectification can arise. The insured is bound by the conditions he may not have specifically agreed to. The policy usually provides that the rights of the insured depend upon the performance of each and every condition.

Conditions are of three kinds—

(1) Conditions precedent to the validity of the policy, e.g., that the statements in the proposal form are true. An untruth will enable the company to avoid the policy.

(2) Conditions subsequent to the policy, e.g., that the insured shall not insure elsewhere. They must be performed if the policy is to retain its validity. The avoidance dates from the breach only—any loss happening before the breach must be paid.

(3) Conditions precedent to liability, e.g., the arbitration condition. The breach does not affect the validity of the policy but only the particular claim.

To constitute a condition no precise form of words is necessary, and the question whether a particular stipulation is a condition or not depends entirely upon the construction to be placed upon the words in which it is expressed. The intention to make the stipulation a condition must be plainly shown. If ambiguously worded it will not be construed as a condition. The point is that a stipulation can be enforced by a cross action for damages only. The mere calling a stipulation a condition will not make it one if, on its true interpretation, it is not a condition.

There are certain stipulations which, because of their nature, cannot be performed until after payment under the policy has been made or the policy has expired (such as the duty of assisting in enforcing subrogation rights or making a return of wages) and are, therefore, incapable of being construed as conditions. There is generally an express condition enabling the right of subrogation to be exercised before payment of the claim.

The non-performance of the conditions precludes not only the insured but also any person claiming through him from enforcing the policy unless there is a special saving of the rights of bona fide assignees for value or there is some statutory provision as in the case of a motor policy.

A condition framed in general terms is performed if the performance goes to the substance of the matter. In so far as a condition goes into details it must be performed strictly—the details, however immaterial, cannot be disregarded. Even the fact that literal performance is impossible does not entitle the insured to depart from the terms of the conditions.

On the other hand a literal performance is sufficient. The company cannot require the insured to go beyond the terms of the condition on the ground that a literal performance does not protect it adequately.

The cause of the breach is immaterial. It may be due to negligence, inadvertence, or the condition may be broken deliberately. Ignorance of the condition is no excuse unless the insured had no opportunity of knowing of its existence, as where the policy had not been issued to him.

A condition which was never at any time capable of being performed, being impossible *ab initio*, is a nullity and the policy is not rendered voidable by its non-performance.

The onus of proof that a condition has been broken rests as a general rule upon the company.

The company may at any time waive performance of a condition. A breach of condition may also be waived. The usual method of waiver is by conduct, though the conduct need not be intended to be

a waiver. The company must with full knowledge of the circumstances do some act which apart from the policy it is entitled to do and which can be justified only upon the footing that the policy is still in existence or which leads the insured to believe that it is treating the policy as valid. There is, however, no waiver of performance or of breach where the insured is not misled. There may, of course, be an express waiver. Even when the policy contains a condition dealing with waiver, such conditions may be waived by conduct.

Exceptions. Exceptions are usually printed among the conditions though, strictly speaking, they are not conditions. The onus of proving that a loss falls within an exception rests upon the company, but it may, by the terms of the policy, be shifted to the insured.

Schedule of Property Insured. The description may be either general or specific. The importance of the distinction lies in this—where the various items of property are from time to time replaced by similar items, the description, if sufficiently general, will cover the substituted items, but if the description is so specific as to apply only to those items which were in existence at the commencement of the insurance, the substituted items will not be covered.

Description of Risk. The policy defines the risk insured, and the insurance is limited accordingly. The company does not undertake a general liability to the insured. The validity of the policy is not affected by a misdescription due to the fault of the company or its agent. A description which is substantially accurate is sufficient. The description is of the risk as it exists at the time the insurance was effected. If it subsequently becomes inaccurate, owing to change of circumstances, there may be a breach of a condition against alteration. If the alteration makes the risk a different risk, there is no liability.

An alteration which does not affect the definition of the risk and make it inapplicable is not an alteration of the risk even though it increases the danger and causes the loss, and does not affect the validity of the policy unless expressly prohibited.

An alteration which does not affect the identity of the subject matter is an alteration of risk if, by reason of the alteration, the risk ceases to correspond with the risk as described in the policy. For example, where the description includes the situation of the subject matter, it must be in that situation at the time of the loss—if elsewhere, the company is not liable. The alteration merely suspends the operation of the policy. When the subject matter is returned the policy reattaches.

A policy usually contains express conditions dealing with alterations, and the position is governed by these conditions.

THE PREMIUM

There must be a premium for every insurance. It is the consideration for the contract. The exact amount need not be agreed when the policy is effected. In many cases the amount cannot be calculated until the risk has expired, and a provisional payment subject to adjustment is made.

Payment of Premium. The premium may be paid to an agent. The authority need not be an express authority. It may be implied from the circumstances. Payment to an agent who has ceased to represent the company is binding unless the insured has had notice that the agency has been terminated. The payment must be made in a form in which the agent is authorized to receive it. Payment by promissory note is not binding unless such mode of payment is authorized, nor is an agreement to give credit.

As soon as the contract is agreed the insured becomes liable to pay the premium but his failure to pay does not in itself absolve the company from liability. In practice pre-payment of the premium (both first and renewal) is usually made a condition precedent to liability.

Return of Premium. Any right to return of premium must be based on failure of consideration on the ground that no risk has been run, e.g., when the policy was unlawful or when it is avoided by some breach of the duty of good faith or when it never attached because of the non-performance of some condition precedent or where there was never anything at risk.

The essence of the right to a return is the fact that the risk never attached. If, in a certain event, the company might have been liable, the fact that the event did not happen does not give the insured any right to a return.

The point is usually provided for by express condition, which also deals with partial failure and sometimes provides for forfeiture in certain events, as for instance where the policy is avoided by some misstatement.

DURATION OF POLICY

There is no statutory limit upon the period for which an accident policy may be in force. It is a matter of agreement between the insured and the company.

In the absence of any particular hour, the period expires at midnight of the last day named. As regards the commencement of the period the day named as the day from which the period is to run is not included unless so provided.

CANCELLATION OF POLICY

A policy may be cancelled by mutual consent, and some policies contain conditions dealing with the surrender of the policy. Many policies give the company the right to discontinue on notice and refund of unexpired premium. Such a power may be exercised at will, and the company is not bound to give a reason unless the policy so provides.

RENEWAL OF POLICY

The policy, unless renewed, ceases to be effective at the expiration of the period of insurance. If a claim for a loss which happens afterwards is paid in the belief that the policy is effective, the money can be recovered as having been paid under a mistake of fact.

The policy usually provides that it shall be renewable by mutual consent. The company is, therefore, not bound to accept the renewal premium but if it invites renewal as by issuing a renewal notice then it is bound to accept the premium.

Each renewal constitutes a fresh contract, the duty of disclosure reattaches and the insured must disclose any facts which have become material during the preceding period of insurance. It is the duty of the insured to correct any statement in the proposal form which has become inaccurate. On the other hand, as each renewal is a fresh contract it follows that a renewed policy is not avoided by a misstatement which would have avoided the original insurance if it has in fact become correct before renewal.

Days of Grace. It is the usual practice to allow days of grace except in motor insurances. Payment during the days of grace is equivalent to payment on the due date, and if a loss occurs during the days of grace before the premium is paid, the subsequent payment of the premium during the days of grace effectively renews the policy, and the loss is covered.

REVIVAL OF POLICY

A lapsed policy may be revived by mutual consent. On revival there is a fresh contract, and fresh terms and conditions may be introduced.

CLAIMS

The policy contains stipulations as to notice and subsequent particulars and proofs. As a general rule this is a condition precedent

and no claim is maintainable unless the duty is performed accordingly and the fact that the failure was due to circumstances beyond the insured's control is immaterial.

When notice has to be given " immediately " or " forthwith " the effect is that the notice must be given within a reasonable time, and unless stipulated need not be in writing or be given by the insured personally. The particulars of loss required vary according to the class of insurance, but in any case the insured has not performed his duty adequately unless he has furnished the best particulars which can be furnished in the circumstances.

Proofs of loss are not confined to documentary proofs. The loss may be proved by any satisfactory evidence and the company must be satisfied with such proofs as would satisfy reasonable men.

If the policy makes it a condition precedent that the particulars and proof are to be delivered within a certain time, the Company is absolved from liability by failure to deliver within the prescribed time.

In the absence of any stipulation to the contrary the insured is not precluded from amending his claim and increasing the amount, and even after the claim is paid may make a further claim unless precluded by the receipt.

Fraudulent Claims. The making of a fraudulent claim is a breach of the duty of good faith and as a consequence the insured forfeits all benefit under the policy, whether it contains a condition to that effect or not. Usually, however, the position is dealt with in the conditions.

The mere fact that the insured has claimed an excessive amount is not necessarily proof of fraud. It depends upon the facts of the case. The insured may have honestly overvalued his property or overestimated the loss. The excess, however, may be so great as to justify the conclusion that the exaggerated amount cannot be an honest estimate and must have been intended to deceive. An exaggeration of amount is also treated as fraudulent where the insured puts forward deliberately exaggerated figures, not for the purpose of inducing the company to pay the full amount but for the purpose of negotiating a settlement.

Payment of Claims. Payment which must be made in cash except where otherwise agreed must be made to the insured, his personal representative, his assignee or trustee in bankruptcy as the case may be.

If a garnishee order is made against the company after the amount payable has been agreed, payment must be made to the judgment creditor. In the case of a joint policy the receipt of any of the policyholders is sufficient. In the case of an accident policy

the company has no direct right to make a payment into Court. The insured is not entitled to interest as a matter of course but the Court may award interest by way of damages for wrongful detention of money which ought to have been paid. *Ex gratia* payments are made in the ordinary course of business and are therefore not *ultra vires*.

Subrogation. The doctrine applies to all policies which are contracts of indemnity whether the loss is total or partial. The right does not arise until the company has admitted and paid the claim. The precise nature of the third party's liability is immaterial. Subrogation applies to a statutory liability and is not confined to tort. The liability may arise under contract.

In the absence of a formal assignment of the right of action the company cannot sue in its own name. It must bring the action in the name of the insured and it is his duty to permit his name to be used on receiving a proper indemnity against costs.

In a subrogated action the third party may raise any defence which would have been available if the insured had himself brought the action, such as receipt or compromise. It is not a defence that the action is a subrogated action or that the insured has suffered no loss because he has been indemnified by the company or that the payment was *ex gratia*, and the company knew that there was no liability.

The damages recoverable are not limited to the amount paid by the company, but the company must account to the insured for anything recovered beyond the amount of the claim paid unless the insured has assigned his rights.

It is the duty of the insured to do no act which may prejudice the right of subrogation. He must not settle with the third party nor take proceedings himself without the company's consent.

Where the amount of the loss exceeds the amount paid under the policy, there is a case of partial subrogation only and the insured is not necessarily deprived of his right to take proceedings, but any proceedings he takes must be for the benefit of the company as well as himself. Where there is under-insurance the insured is entitled to indemnity before he passes any portion of the recovery to the company.

Indemnification *Aliunde* (Indemnification Elsewhere). The fact that the insured may be entitled to be compensated by a third party does not in itself absolve the company of its obligations under the policy.

Unless so provided the insured is not bound to exhaust his rights against third parties before having recourse to the policy. He is entitled to claim under the policy, leaving the company to exercise its right of subrogation.

If before payment is made under the policy the third party makes a payment to the insured to compensate him for his loss, the loss which the insured has suffered is *pro tanto* diminished and he can no longer claim payment in full under the policy. The amount must be taken into account and the claim will accordingly be diminished or extinguished. The same principle applies to payments received from third parties after payment of the loss in full under the policy—the insured must account to the company.

Though the company pay the insured and have a knock-for-knock agreement with the third party's company it cannot prevent the insured enforcing his claim against the third party for any item of his loss to which the insurance does not relate.

ARBITRATION

The clause is a valid submission to arbitration, though not signed by the insured, and is binding upon him.

Some arbitration clauses deal with questions of amount only; others extend to the question of liability and in its usual and widest form the arbitrator is empowered to decide questions of construction and other legal questions. The arbitrator is limited to disputes arising under the policy. He cannot deal with a claim for return of premium where the claim is founded upon the invalidity of the policy, or enforce a compromise of a disputed claim.

An arbitration clause does not necessarily preclude the insured from bringing an action to enforce his claim. The clause may be nothing more than a collateral term of the contract by which a tribunal for determining disputes is provided. In such a case there is a complete cause of action before the clause becomes operative, and if the insured brings an action the company is not relieved from liability but it is entitled to apply under the clause to have the action stayed.

As a general rule, however, the arbitration clause provides that an award of the arbitrator is to be a condition precedent to any action on the policy, and no action is to be brought except for the amount of the award. In this case the cause of action is not complete until the arbitration has taken place and an award made. The only obligation of the company is to pay the amount awarded, and unless the award is in his favour the insured may bring no action at all. If, therefore, the company apply for a stay the Court has no discretion and must grant it except that where a question of fraud is involved the Court may order that the arbitration agreement shall cease to have effect and that any submission made thereunder be revoked, and may refuse to stay any action brought in breach of the agreement.

DOUBLE INSURANCE

The existence of double insurance does not necessarily invalidate an accident policy but in some classes, particularly personal accident, failure to disclose all the existing insurances will avoid the policy. The duty of disclosing existing insurances extends to insurances which come into existence after the date of the proposal but before the issue of the policy but not to insurances effected subsequently unless the policy deals with the point.

The insured is at liberty to effect as many policies as he pleases but where the contract is one of indemnity he cannot recover more than the amount of his loss. Apart from any condition in the policy he is entitled to claim in full under any of the policies, leaving the company to claim contribution from its co-insurers. Most policies, however, contain a contribution clause limiting the liability to a rateable proportion of the loss.

Contribution. To give rise to a right of contribution the following conditions must be fulfilled—

(1) Each policy must cover the loss of the same property by the same peril. Other property and other perils may be included in the policies.

(2) Each policy must cover the same interest in the same property. It is not sufficient that they cover the same property; they must cover a common interest as well. Separate insurances on the same property by different persons interested in it for the purpose of protecting their separate interests only do not give rise to contribution. Where, however, one policy is intended to enure for the benefit of both persons interested in the property, as where the mortgagor intends to cover the interest of his mortgagee as well as his own, the policy can be brought into contribution.

(3) Each policy must be in force and be a legal contract of insurance.

The right of contribution may be restricted or excluded by the policy.

Where two policies each containing, in addition to the usual contribution clause, a second condition excluding contribution if the risk is covered by another policy, the policies will not be treated as mutually exclusive and there will be contribution.

AVERAGE

In the absence of any stipulation to the contrary policies are not subject to average.

The usual average clause provides that if at the time of the loss the sum insured is less than the value of the property the insured is to be considered as his own insurer for the difference and is to bear a rateable proportion of the loss accordingly.

An attempt is often made to apply this principle to household policies which are based upon a proposal form containing a declaration that the sum insured represents full value when, as is frequently the case, it is found on dealing with a claim that there is under-insurance.

The warranty as to full value, being a continuing warranty and the insured being under a duty to disclose the full value at each renewal, the position would seem to be that if the policy were renewed for an inadequate amount the policy could be avoided; and while the application of average is an equitable way of dealing with the position it would not seem that the company could enforce its application.

The view that the warranty as to full value is a continuing warranty is not universally held among the companies and therefore until we have a legal decision on the point it must remain a matter of opinion.

THE AMOUNT RECOVERABLE

The sum stated in the policy merely represents the maximum sum for which the company is liable unless the policy is a valued one. The insured is only entitled to a full indemnity within the limit of the policy and cannot recover more than his loss or the amount of the policy if his loss exceeds the sum insured.

The amount recoverable is measured by the amount of the loss, that is, the value which the accident has taken away from his property. The value is the value of the physical property. No loss of prospective profits or other consequential loss can be included. The value is the intrinsic value—its real and actual value. No allowance is made for mere sentimental value. The value is the value at the time of the accident. If the value has increased since the policy was taken out, the insured is entitled to recover on the increased value subject to the limit of the policy.

Prima facie the loss is to be measured on the basis of market value, but where this cannot be applied the amount is based on reinstatement cost. In case of partial loss the amount recoverable is based on the cost of repairs.

The insured can recover only the amount of his interest. If he has only a partial interest he can recover only the amount of his interest and no more.

REINSTATEMENT

Unless the policy otherwise provides, the obligation is to pay in money and to pay money only, and the company cannot substitute a different method of performing its obligation and insist on reinstating the property.

The insured on receiving the insurance money can do what he likes with it. He cannot be required to expend it upon reinstatement unless under an obligation to do so by statute or contract.

The policy sometimes gives the company the option of reinstating the property. This option is for its benefit and it is for the company to elect whether to reinstate, and the insured is not entitled to require it to reinstate or to prevent it if it elects to do so.

An election once made is final and cannot afterwards be withdrawn. No formal election is necessary—an election by conduct is sufficient. The company will be taken to have elected against reinstatement if the negotiations have been conducted by the company throughout on the footing that the loss is to be made good by a money payment or if it has proceeded to arbitration. They are not bound to exercise the option immediately and are entitled before exercising it to investigate the claim and ascertain what the amount is likely to be. A mere provisional assessment, even if made in conjunction with the insured, does not debar it from electing to reinstate.

As soon as the company elects to reinstate, its obligation to make a money payment ceases and the contract becomes a contract to reinstate. The company is not entitled to any allowance if the reinstated article is better than the original one.

If it fails to reinstate the company is guilty of a breach of contract and it is no defence that the reinstatement would cost more to carry out than it anticipated at the time when it elected, or even that reinstatement had become impossible. The damages which may be awarded against it are not necessarily limited to the amount which would have been payable under the policy.

There may be a condition stating that the company shall not be obliged to reinstate in a manner identical with that prior to the loss.

SALVAGE

It is the duty of the insured to minimize the loss. The company may take possession of any salvage. If it takes possession of the salvage it is its duty to take proper steps to preserve it from further damage, and an action lies against it if the salvage continues to deteriorate. On payment of the loss in full the salvage becomes the property of the company.

FIRE

As many accident policies cover loss by fire, lightning and explosion it is necessary to deal briefly with this subject.

There is no fire within the meaning of the policy unless there is ignition—heating unaccompanied by ignition is insufficient; there must be ignition of the property or the premises where it is. If property in proximity to a source of heat in ordinary use is damaged by the excessive heat but is not actually ignited, the damage is not within the policy since there is no ignition.

It is not necessary that the fire should be purely accidental in origin. It may be due to negligence and it is immaterial whether the negligence is attributable to a stranger or to a servant or is the negligence of the insured himself. Even the fact that the fire was deliberately lighted for the purpose of destroying the property insured does not disentitle the insured from recovering unless the fire was lighted by the insured himself or someone acting with his privity or consent.

It is immaterial that the fire was in a place where it was intended to be. Where the insured lighted a fire in a grate, forgetting she had hidden goods there, it was held that there was an ignition of insured property not intended to be ignited and a loss by fire.

Where lightning is included, damage by lightning which does not result in fire is covered.

If the property is burned there is a loss by fire whether the fire was caused by lightning or something else.

It is not necessary to show that the subject matter of the insurance has been actually burned. It is sufficient that the loss has been proximately caused by the fire.

In the following cases the loss may be regarded as proximately caused by fire—

(1) Losses which are the necessary consequences of fire. If there had been no fire they could not have happened. Thus, where a fire attacks the fabric of a building and causes the roof or walls to fall upon other property in the building and destroy it, the destruction caused by the fall is proximately caused by the fire and there is liability unless it has been specifically excluded.

(2) Losses which are the reasonable and probable consequence of fire in that they result in the ordinary course of events from the happening of fire. Thus losses may be sustained through attempts to check the progress of a fire. Property may be damaged by the water used in extinguishment of the flames, or buildings may be blown up to prevent the fire spreading, or property may be damaged in the course of removal. Losses by theft during fire are also regarded as proximately caused by fire.

Losses which are not proximately but only remotely caused by fire are not covered, as—

(1) Losses of which the fire is in the strict sense the remote cause. Where a fire causes an explosion and property in other premises situate at a distance from the fire is destroyed by atmospheric pressure resulting from the explosives, the fire is not the proximate but the remote cause of the fire.

(2) Consequential losses, such as the further loss in which the the loss of the property may involve the insured, as for instance the cost of hiring other property to take the place of that destroyed, or the loss of profits which he would have been able to earn if his property had not been damaged by the fire. These losses are not the natural but only the accidental consequences.

Excepted Perils. The doctrine of proximate cause is applied equally for the purpose of determining whether a loss is caused by an excepted peril. If the subject matter is burned but the fire which burned it derived its origin from an excepted peril, the liability depends upon whether the excepted peril is regarded as the proximate cause of the loss. Where the fire is the natural consequence of the excepted peril the excepted peril is the proximate cause, as when an incendiary bomb is dropped and sets a building on fire. Such damage to a building though caused by fire, is a natural consequence of military operations and is therefore proximately caused by the excepted peril.

Where on the other hand the fire is not the natural but merely an accidental consequence of the excepted peril, the proximate cause of the loss is the fire, the excepted peril being the remote cause only and the loss is therefore covered by the policy.

Where a fire which is directly caused by an excepted peril spreads solely by the operation of natural causes, all losses caused by the fire, however distant from the place where the fire originated, are proximately caused by the excepted peril.

If the spread of the fire is due not to natural causes but to the intervention of a new and unexpected cause, the chain of causation is broken and the fire, being an accidental consequence only of the excepted peril, becomes a fresh fire. The excepted peril, therefore, is not the proximate cause of the subsequent loss which is caused by the fresh fire and therefore covered by the policy. The exception, however, may be so worded as to exclude loss even when the excepted peril is the remote cause.

The most important excepted perils are—

Riot. This word is used in its ordinary legal meaning. There must be a tumultuous disturbance of the peace by three or more persons.

Civil Commotion. This phrase means an insurrection of the people for general purposes not amounting to rebellion. It is a state intermediate between riot and civil war.

Military and Usurped Power. This contemplates acts of warfare committed by belligerents (and acts of incendiarism and robbery committed by private looters in the course of military operations) who may be either foreign enemies invading the realm or subjects of the Crown engaged in internal rebellion. It also covers acts done by the forces of the Crown in repelling the enemy or suppressing the rebellion.

The foregoing applies to accident (and fire) policies generally, but there are a few observations which must be made with regard to the individual classes.

PERSONAL ACCIDENT

This has been held not to be life assurance and has been recognized as a distinct class by the Stamp Act, 1891, and the Assurance Companies Acts, 1909 to 1946. It is not a contract of indemnity.

The policy covers personal injury resulting in death or disablement caused by accidental, violent, external and visible means. The word "accidental" excludes the operation of natural causes and implies the intervention of some cause which is brought into operation by chance and can be described as fortuitous.

The cause of the injury may in itself be fortuitous, as where the insured is run over by a train or falls into a river and is drowned, or slips on a step, or the injury may not be the natural but only the fortuitous consequence of some cause which would not in the ordinary course of things result in injury, as where the insured is drowned whilst bathing or dislocates a cartilage in his knee whilst stooping to pick up a marble.

If there is nothing fortuitous about the cause, and the injury is the natural consequence of the cause, there is no accident, as where a person sustains sunstroke in the ordinary discharge of his duty under a tropical sun.

The fact that a particular consequence was not foreseen does not make it accidental if it is in fact the natural consequence of a cause which is not accidental. Thus, there is no accident where a person with a weak heart injures it by running to catch a train.

The policy covers accidents caused by the negligence of the insured or of third parties, and injuries caused by the wilful or criminal act of a third party, provided that the insured is not a party to it.

The word " violent " is used in this connection to express the antithesis to without any violence at all. It is not restricted to cases of actual violence. Any injury due to some external impersonal cause, such as death by drowning, is to be regarded as caused by violent means. Similarly it applies to the use of some extra exertion and some extra physical force by the insured, e.g., stooping to pick up a marble and dislocating the cartilage of the knee.

The word " external " expresses the antithesis to internal. Any cause which is not internal must be external. The injury need not be external. Where the actual cause of the injury is external the fact that it is brought into operation by some internal cause is to be disregarded. Thus if the insured is seized with a fit and is drowned or falls in front of a train and is killed, his death is due to an external cause.

Within the meaning of the policy the word " visible " applies to any cause which is external.

Exceptions. There are many exceptions to the policy excluding from its scope cases where the death or injury is due directly or indirectly to particular causes.

Proximate Cause. The doctrine of proximate cause applies. The injury must be proximately caused by the accident, and the death or disablement proximately caused by the injury. The application of the doctrine is sometimes modified or excluded by the terms of a particular policy.

Disease. In cases of diseases following upon an accident, if the death or disablement though actually due to disease is nevertheless proximately caused by accident, the disease being a mere sequela of the accident, there is liability. Thus where a fall causes hernia or pneumonia from which the insured dies, his death is caused by accident, and an express exception against hernia or pneumonia has no application unless so worded to exclude disease however caused.

Suicide. The policy invariably excludes suicide by an express condition. It must be remembered that the presumption is against suicide. Suicide is a crime and a person is presumed innocent until found guilty.

BURGLARY

Except for the difference due to the nature of the perils the principles applicable to fire insurance apply equally to burglary insurance.

When the perils insured against are described in the technical terms of the criminal law there is a presumption that the terms are intended to bear their technical meaning, but this may be rebutted

by the terms of the policy, as where it contains a definition of the word " burglary." In such a case it is necessary to show that the act causing the loss falls within the definition, and not merely that according to the criminal law burglary has been committed.

If the policy requires actual forcible and violent entry, the entry must be obtained by the use of both force and violence. An entry obtained by turning the handle of an outside door or by the use of a skeleton key, though sufficient to constitute the criminal offence, is not within the policy. Picking a lock or forcing back the catch by means of an instrument involves the use of violence and is within the policy.

The violence must be connected with the act of entry. If the entry is obtained without violence the subsequent act of violence such as breaking open a show case does not bring the loss within the definition in the policy.

Where larceny is included there is no loss unless the property is actually taken and carried away. In the absence of an actual loss an asportation which is sufficient to complete the criminal offence is disregarded. Loss due to larceny by a trick is within the policy.

" Theft " is not a technical term in the criminal law and it expresses a common factor of a number of crimes which each have a technical name. In these policies it is a mere equivalent of the word " larceny."

There are the usual exceptions in a burglary policy.

(1) Exception excluding losses due to hostilities and similar perils. This, however, would not exclude a burglary taking place during an air raid.

(2) Exceptions excluding losses which can be covered by some other class of policy. A thief breaks a plate glass window for the purpose of obtaining an entry. The breakage falls within the plate glass policy.

(3) Exceptions excluding liability when the crime is committed by or with the connivance or assistance of a person belonging to a specified class. To bring the exception into operation it is unnecessary to prove that the excepted person was the person who actually committed the crime. The exception applies whether he is a principal in the first or in the second degree or only an accessory before the fact.

In burglary insurance, moral hazard being most important, the nationality of origin of the insured and his previous claims experience may be material facts which ought to be disclosed.

There may be conditions imposing precautions. A condition that all doors, windows and other means of entrance must be secured is not breached by the failure to lock the door of an inside show case.

A condition that the premises are always to be occupied and not left unoccupied at night does not require the continuous presence of someone on the premises. Premises do not become unoccupied by reason of the temporary absence of all the inmates.

The policy contemplates that the property which is stolen shall have been stolen from the premises described in the policy. If the premises described comprise part of a building only, the property must be stolen from that part. The theft from any other part is not covered. The term " garage " connotes some sort of building. A yard without a roof is not a garage.

In the case of " all risks " policies there must be a casualty—something accidental and fortuitous—in order that there may be a valid claim. Conversion depriving the owner of possession of the insured goods would suffice.

PLATE GLASS AND LIVE STOCK

There are no special doctrines or rules that affect these classes. The considerations which apply to insurance contracts generally apply subject to any express conditions in the policy. In live stock policies there is usually a special condition of average requiring the insured to bear a part of the loss himself.

THIRD PARTY

Few questions arise upon the special features of this class. The policy is a contract of indemnity and the event insured against is the happening of the liability. The liability must be a legal liability. A liability which becomes effective through waiver of diplomatic privilege is a legal liability. The liability must be the liability described in the policy. The words " neglect, omission or error " do not cover fraudulent acts. If the liability is to arise out of accidents connected with a particular business, liability arising out of accidents not connected with that business is not covered.

The policy quotes the proposal form which is the basis of the contract.

The question of the method of premium calculation was considered in *Bradley v. Essex and Suffolk Accident Indemnity Society*, [1912] 1 K.B. 415 C.A., where the stipulation requiring a wages book to be kept was held not to be a condition precedent to liability.

The amount payable under the policy will, in the absence of a settlement out of Court, depend upon the result of the proceedings brought by the injured party. There are, therefore, special duties

cast upon the insured in regard to any claims made upon him and requiring him to give full information and assistance to the company and to forward to the company any letters and documents received. He is also prohibited by the policy from settling any claim by a third party or making any admission. The company is by the policy given power to take over the defence of any proceedings brought against the insured, but the fact that the defendant is insured ought not to be disclosed to the jury. The prohibition against the mention of insurance does not apply when the trial is by Judge alone. If the company declines to take over the defence it cannot afterwards complain of a bona fide settlement. As insurer the company is not entitled to intervene in the proceedings. The insured is the defendant on the record and as far as the Court is concerned he has the conduct and control of the proceedings. Although the company has control over proceedings, it is not a party and cannot make an application in its own name.

The exercise of the power to take over in the name and on behalf of the insured the conduct and control of the defence does not involve it in any liability to the third party. It does not make itself responsible to him for payment of the damages nor does it become liable to him for maintenance.

Where by the policy the company is given full discretion in the settlement of a claim, it may settle without consulting the insured and if the policy is subject to an excess he becomes liable for the amount of the excess.

It is the duty of the company, if it undertakes the defence, to conduct it properly and if by any negligence on its part the defence is improperly conducted and the damages awarded against the insured are accordingly increased, it is liable to make good to him the amount of the increase, and it is immaterial that it is in excess of the maximum sum insured.

As regards the costs which may be awarded against the insured, if the company insists on defending the proceedings without consulting him it must indemnify him against the whole of the costs, and cannot claim the benefit of any stipulation in the policy by which its liability for costs is limited. The company, by continuing the defence with knowledge of the circumstances, may be precluded from disputing its liability to the insured. The company's solicitor is bound to act bona fide in the common interest of the company and the insured.

Where the policy contains a monetary limit the company may, if it chooses, settle with the insured by paying him the amount of the limit plus costs incurred to date and leave him to deal with the claim.

Subrogation. The person who has suffered the injury or damage for which the insured is liable is not a party or privy to the contract of insurance and had not at common law or in equity any right to the money payable under the policy which he could enforce directly against either the company or the insured. In the event of the insured's bankruptcy, therefore, the policy money became part of his general assets and even when the policy money formed the whole of the assets the third party ranked as an ordinary creditor only.

In 1897, in the case of workmen's compensation, a statutory right of subrogation was given to a workman, and in 1930 a general scheme of statutory subrogation was established by the Third Party (Rights against Insurers) Act, 1930. This Act applies to all contracts of insurance which cover liabilities to third parties. Such liabilities usually arise in tort but there is nothing in the Act to limit its application to such liabilities or, except in the case of reinsurance, to exclude its application to contractual liabilities.

The statutory obligation depends upon the insolvency of the insured. The insured must become bankrupt or make a composition or arrangement with his creditors or, if a company, a winding up order must be made or a resolution for a voluntary winding up must be passed or a receiver or manager appointed or possession taken on behalf of the debenture-holders.

The Road Traffic Act, 1934, extended the rights of third parties against the insurer in the case of compulsory motor insurance. Upon the insolvency of the insured his rights against the insurers are transferred to and vest in the third party to whom the liability insured is incurred. The company then becomes liable in his place to the third party.

Any condition in the policy purporting whether directly or indirectly to avoid the policy, or to alter the rights of the parties under the policy in the event of the insured's insolvency, or to preclude third parties from obtaining information as to the existence of the policy, is void. With these exceptions the conditions of the policy remain binding upon the third party; thus he is bound by the arbitration clause.

No settlement of a claim between the company and the insured can defeat the rights of the third party.

For the purpose of enabling third parties to ascertain whether the person sought to be made liable is insured or not they are entitled to apply for the necessary information to the insured if insolvent or to the trustee in bankruptcy or liquidator. If the information given discloses reasonable grounds for supposing that a case of statutory subrogation has or may arise, the company is subject to the same duty to give information.

FIDELITY GUARANTEE

A fidelity guarantee policy bears a close resemblance to a contract of guarantee. There is, however, a distinction between an insurance and a guarantee. Insurance is purely a business contract and liability is accepted in consideration of a premium calculated according to risk. In the case of a guarantee liability is usually accepted on personal grounds and without payment.

The company has no personal knowledge of the risk—it relies entirely upon what it is told. Consequently, as under other insurance contracts, it is entitled to a full disclosure of all material facts. In the case of guarantee, the duty is less extensive. The company is not a surety. It does not undertake to pay the original debt but to pay a new debt which arises under a contract of indemnity and which may differ from the original debt both in amount and date of payment.

The company has no independent rights against the debtor, but is merely subrogated to the remedies of the insured, whereas a surety has a direct claim against the debtor.

The fact that the contract is framed in the form of a policy is some evidence of intention, but this is not conclusive. A contract in the form of a policy may in effect be a guarantee and vice versa. Many contracts may with equal force be called either insurance or guarantee, and in many cases it is immaterial to which class they belong.

A policy of fidelity insurance contemplates loss by criminal misappropriation of money, securities or goods. The perils insured against are sometimes described as fraud or dishonesty of the servant, but usually the terms of the criminal law are used and the policy refers specifically to losses by larceny or embezzlement. Where these words are used they must be construed strictly. They bear the same meaning as in an indictment, and the insured cannot recover unless he proves that the particular offence described in the policy has in fact been committed. The policy does not extend to cover losses due to a crime for which the servant is not responsible, e.g., where he is robbed of the insured's money.

Policies are sometimes extended to cover acts which are not criminal, such as wilful default or negligence, and many special forms of policies and bonds go far beyond the dishonesty cover.

The statements in the employer's form are the basis of the contract, and the servant must continue to be employed accordingly during the currency of the policy. If the servant is employed in a different capacity or is required to perform different duties, the policy ceases to attach. The answers as to the servant's duties may have been mere statements of fact and not warranties. It is necessary that they should be clearly made the basis of the insurance.

There is an express condition that no alteration shall be made in the system of check. In the absence of such express condition any alteration of routine or method of check does not affect the identity of the risk.

The loss takes place when the property is misappropriated, not when the misappropriation is discovered; but the modern policy is usually limited to thefts committed and discovered during the currency and within twelve months of their occurrence. In the absence of such a stipulation the policy would cover any misappropriation committed within the currency though not discovered until the policy has lapsed.

Subject to express conditions the duty of giving notice of the loss does not arise until the employer has satisfied himself of his servant's dishonesty. The employer is under no duty to notify mere suspicion.

In the event of claim the company, if liable for the whole loss, is entitled to be credited with any commission or salary to which the servant would have been entitled if he had not been dishonest and with any money belonging to the servant in the hands of the employer. Any amount owing to the servant must be deducted from the amount of the loss. The company is also entitled to the benefit of all other policies, securities or guarantees available in the hands of the employer towards the recoupment of the loss. Such benefit is enforceable by contribution or subrogation as the case may be.

MOTOR

The foundation of the policy is the insurance of the car and once the subject matter has been destroyed the whole policy becomes void. The tariff offices have dealt specially with the position but their lead has not been followed by all the companies. They have agreed to regard the policy as remaining in force though the subject matter has been destroyed.

The policy, which is usually a comprehensive one, includes the third party insurance which is compulsory.

The fire, burglary and personal accident covers in the motor policy present no special points of interest beyond those dealt with under these headings. The own damage cover is governed, subject to any special policy conditions, by the principles relating to property insurance generally. It is the third party cover for personal injuries, regulated as it is by statute, that presents special features and which is dealt with in the following pages.

Third Party Cover. The third party cover is a contract of indemnity against the consequences of negligence. Such a policy is

not void as contrary to public policy, and even when the insured is guilty of manslaughter he is entitled to be indemnified against the civil consequences of his crime. On the other hand the policy confers no indemnity against the consequences of acts wilfully committed.

Except where the policy so provides there need be no accident to the vehicle. It is sufficient if the vehicle is the efficient cause of the accident to the third party.

Other Drivers. The policy contains a provision protecting persons other than the insured against liability they may incur to third parties whilst driving the insured vehicle, but such protection is limited to persons who are not covered by any other policy.

If both policies contain a clause excluding liability in case of other insurance, and there is a contribution clause in either or both, effect must be given to the contribution clause and the policies will not be treated as mutually exclusive. Any person falling within the terms of this extension is entitled to enforce the policy.

Where the protected person is entitled to indemnity in respect of claims by any person, " any person " means a third party and thus the policy holder may become a third party. Hence the driver can claim an indemnity in respect of his liability to the policyholder. Driving with permission does not include a purchaser driving the car away after sale by the insured.

Restrictive Conditions. The policy contains conditions restricting the scope of the insurance. These are binding as between the company and the insured though, if a case of statutory subrogation arises, they are not generally speaking binding on the third party.

The most important stipulation relates to the use of the insured vehicle. The purposes for which the vehicle may be used may be described in the policy either in express terms or by incorporation of the proposal, and there may be a further stipulation prohibiting the use of the vehicle for any other purpose.

If, therefore, the vehicle is used for a different purpose there is a different risk and if an accident happens whilst the vehicle is being so used the insured is not covered against its consequences. The use of the vehicle for a different purpose does not, however, in the absence of an express condition to that effect avoid the policy altogether. The result is merely to suspend the operation of the policy. When the use of the vehicle for the described purpose is resumed, the policy again attaches, but the third party is not prejudiced since the establishment of the Motor Insurers' Bureau.

A private car policy excluding use for hiring does not cover use when carrying a passenger for payment, though on an isolated occasion. Sharing of out-of-pocket expenses is not a hiring. The exclusion of use for reward excludes the carrying of passengers for

payments made voluntarily and not under a legally enforceable contract, e.g., daily carriage for voluntary payments equal to railway fares. A policy covering use in the business of the insured does not cover use in that business and in the business of some other person.

There are usually other stipulations. The insured may be prohibited from using the vehicle whilst in an unsafe condition (this is complied with if the vehicle is in a safe condition at the commencement of the journey) or unless a sidecar is attached. There may be a condition against overloading or carrying goods other than personal luggage, or the policy may limit the area in which the vehicle is used or state the place where it is to be garaged. These restrictions limit the risk but they do not necessarily apply to other covers such as personal accident.

The use of the vehicle beyond the restrictions suspends the operation of the policy. It does not avoid the policy unless the provision is made a condition the breach of which avoids the policy. When a policy is voidable it remains a valid and subsisting policy until avoided by the company.

Compulsory Insurance. Insurance against third party risks is compulsory under the terms of the Road Traffic Acts. This requirement applies to accidents causing death or bodily injury only. Insurance against damage to property is not compulsory. Certain classes of vehicles are exempt, viz.—

Vehicles owned by public authorities, police authorities and persons who have made a deposit of £15,000 with the Supreme Court.

Invalid carriages.

Tramcars or trolley vehicles used under statutory authority.

It has also been held that a Diesel dumper used for road construction is exempt.

No motor vehicle (other than those excepted) may be used upon a road unless there is in force a policy of insurance (or a security) in respect of third party risks. The responsibility for the insurance is upon any person who uses or causes or permits any other person to use the vehicle concerned. He is liable to an action for personal injuries if he allows the vehicle to be used in contravention of the Act.

The policy must be issued by an authorized insurer and must insure such person, persons or classes of persons as may be specified therein in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any persons caused by or arising out of the use of the vehicle on a road, including liability to make a payment for emergency treatment required as a result of bodily injury. The company is also liable under the Act for hospital expenses not exceeding £50 (in-patient) and £5 (out-patient).

The policy does not cover any liability in respect of the death or bodily injury arising out of and in the course of the employment of a person employed by the person insured by the policy or, except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the deaths of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claim arises, nor any contractual liability. A contract of employment includes not only a contract with the insured but also a contract with a third party. This proviso does not exempt from the liability to pay for emergency treatment.

The policy excludes injuries to employees of the insured employer. Such exception when applied to the authorized driver treated as the insured excludes an employee of the driver but not an employee of the employer. Thus the driver would be entitled to indemnity in respect of his liability to an injured fellow employee.

The policy may exclude liability to any member of the insured's household who is being carried in the vehicle otherwise than by reason of or in pursuance of a contract of employment. " Insured's household " means the household of which the insured is the head, not the household of which he is a member.

A person indicated in the policy but not a party to it can sue the company on the policy in respect of damages for which he becomes liable when an authorized driver of the insured vehicle, but this is not universally true as some companies' policies do not indemnify the authorized driver of a commercial vehicle in person.

Certificate of Insurance. A policy is of no effect unless and until there is issued by the company a certificate of insurance in the prescribed form. The certificate is required for production, particularly after an accident, as affording evidence that the person using the vehicle is insured in accordance with the Act.

The delivery of a certificate to the insured imposes upon the company the duty of satisfying by payment to the third party any judgment subsequently obtained by him in respect of such liability as is required to be covered under the Act against any person insured by the policy. Delivery of the certificate to a finance company not the agent of the insured is not a compliance with the provision.

The duty does not attach where the policy does not cover the risk at all. A declaration of liability against the company before judgment was refused. Where judgment has been obtained in default of appearance, the company by reason of its statutory liability has a right to apply for an order setting aside the judgment.

Duty of Company to pay Damages. This duty attaches notwithstanding that the company may be entitled to avoid or cancel or may have avoided or cancelled the policy and the third party may sue for this statutory debt. If the amount for which the company becomes liable exceeds the amount for which it would, apart from its statutory duty, be liable for, it may recover the excess from the person insured by the policy. A person claiming under the statutory provisions the benefit of the policy to which he is not a party is bound by the conditions though he has had no notice of them. He claims the benefit and must suffer the burden. The Act does not deprive the company of its right to avoid the policy for misrepresentation. It gives a statutory right to specified persons to sue on the policy but does not place a statutory liability on the company.

No sum is payable by the company in respect of any judgment unless before or within seven days after the commencement of the proceedings in which the judgment was given, the company had notice of the bringing of the proceedings. No sum is payable by the company in respect of any judgment so long as execution thereon is stayed pending an appeal.

No sum is payable by the company in connection with any liability if, before the happening of the accident giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision therein. This is not effective unless, either before the accident or if after the accident within fourteen days of the taking effect of the cancellation, the certificate of insurance was surrendered to the company or a statutory declaration as to its loss or destruction was made by the insured and delivered to the company, or proceedings in respect of the failure to surrender the certificate were commenced by the company.

No sum is payable by the company to the third party if, in an action commenced before or within three months after the commencement of the proceedings in which the judgment in favour of the third party was given, the company has obtained a declaration that, apart from any provision in the policy, it is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular, or if it has avoided the policy on that ground that it was entitled so to do apart from any provision contained in it.

The company is not entitled to the benefit of this qualification as regards any judgment obtained in proceedings commenced before the commencement of the declaratory action, unless before or within seven days after the commencement of the declaratory action, the company has given notice thereof to the third party specifying the non-disclosure or false representation on which it proposes to rely.

The third party is then entitled if he thinks fit to be made a party to the declaratory action.

When a certificate of insurance has been delivered to the insured, certain restrictions on the scope of the policy imposed by its terms are of no effect as regards third parties. They continue to be effective as between the company and the person insured by the policy.

The company is not required to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by it in or towards the discharge of any liability of any person which is covered by the policy by virtue only of the statute, is recoverable by the company from that person.

Inoperative Restrictions. The restrictions which are inoperative as regards third parties are those dealing with—

(1) The age or physical or mental condition of persons driving the insured vehicle.

(2) The condition of the vehicle.

(3) The number of persons that the vehicle carries.

(4) The weight or physical characteristics of the goods that the vehicle carries.

(5) The times at which or the areas within which the vehicle is used.

(6) The horse power or value of the vehicle.

(7) The carrying on the vehicle of any particular apparatus.

(8) The carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the Roads Act, 1920.

Restrictions which are not specified, such as restrictions as to the purpose for which the vehicle is used, are still binding on third parties.

As regards restriction (1), a condition requiring care and diligence is not within it, as where a breach of condition by drunkenness entitled the company to recover from the insured as damages the money it had paid to the injured party. Restriction (4) as to characteristics of goods does not prevent goods carried being restricted to the business or other purpose stated in the policy.

Conditions in a policy relieving the company from liability by reason of some act or omission after an accident are of no effect in connection with claims of third parties under the Act, but a provision requiring the person insured to repay sums which the company has become liable to pay, and which have been applied to the satisfaction of claims of third parties, is not affected.

Disclosure of Insurance. It is the duty of any person against whom any claim in respect of any such liability as is required to be covered by a policy under the Road Traffic Act, 1930, is made by a

third party, to state on demand by or on behalf of the third party whether or not he is insured by a statutory insurance or would have been so insured if the company had not cancelled or avoided the policy, and if he was or would have been so insured, to give particulars of the policy.

Where a certificate of insurance has been delivered to the insured, the insolvency of any person insured by the policy does not affect any such liability of that person who is required to be covered by statutory insurance.

A claim for contribution should be made in the name of the company.

Permitting car to be used without Insurance. Any person causing or permitting the car to be used without insurance is responsible for any injuries that may be caused by its use. It has been held that auctioneers have no control over a purchaser and so do not cause or permit. A brother who lent the purchase money, not being the owner, did not cause or permit. Parting with complete control sanctioned general use and thus permitted use for private purposes not covered by the insurance.

The person is not liable unless the damage is the result of his breach of the statutory duty. Where the loss was due to failure to take action in time against the negligent driver, it was held that there was no liability.

CHAPTER III

THE LAW OF NEGLIGENCE

NEGLIGENCE is a tort. There are many other torts such as trespass, conversion, defamation and deceit. The law of torts forms a part of the Common Law. It is not the creation of an Act of Parliament though many statutes have been passed modifying, extending, and in various ways amending it.

A tort is a civil wrong for which the remedy is an action for damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.

A wrong may at the same time be both a civil wrong and a criminal wrong, and when it is so the doer is subject to both classes of proceedings, viz, damages for the civil, and fine or imprisonment for the criminal wrong. The distinction between civil and criminal wrongs depends upon the nature of the appropriate remedy provided by the law.

It does not necessarily follow that all civil injuries are torts because a tort is a civil injury. That the appropriate remedy is an action for damages is an essential characteristic of a tort.

It is not all wrongs that are torts. For instance wrongs which are exclusively criminal or exclusively breaches of contract or exclusively breaches of trust or which create no right of action for damages but give right to some other form of liability exclusively, are all outside the sphere of tort.

Though subject to some exceptions, a tort is some act or omission by the defendant whereby he negligently causes harm to the plaintiff. There must be negligence on the part of the defendant and damage suffered by the plaintiff therefrom.

DAMNUM SINE INJURIA

There are, however, some forms of harm of which the law takes no account and many acts which, though harmful, are not wrongful and give no right of action. Such damage is called *damnum sine injuria*. Thus the harm to the individual may be conterbalanced by the benefit accruing to the public at large, as in the case of the loss to individual traders by competition.

No action will lie for mere mental suffering unaccompanied by physical harm although caused by the negligence of the defendant. Mental pain or anxiety the law cannot value and does not pretend to redress.

INJURIA SINE DAMNO

There are also acts which are actionable as a tort though they have not caused damage such as libel which is actionable *per se*.

MENS REA

The existence of *mens rea* is required by law for liability in an action for tort. *Mens rea* is the existence of either wrongful intent or culpable negligence on the part of the defendant.

Absolute Liability. This rule that *mens rea* in the form of either wrongful intent or negligence is an essential condition of civil liability for a tort, is subject to several exceptions which are usually referred to as cases of absolute liability, that is, liability independent of intention or negligence on the part of the person responsible. In such cases the law imposes a conclusive presumption of negligence. The justification for this is that the proof of the necessary *mens rea* would impose too great a burden on the plaintiff in these particular cases, and so tend to prevent him obtaining redress for the injury he has suffered. Such cases fall into three classes—

(1) Vicarious liability for the wrongful acts of others.
(2) Liability for inevitable accident.
(3) Liability for inevitable mistake.

The first class—vicarious liability—will be dealt with later.

Inevitable Accident. The accident need not be inevitable in the strict sense of the word, that is, incapable of being prevented at all. The term means such accidents as are not caused intentionally and could not have been avoided by reasonable care, such as trespasses of cattle and damage done by the escape of water kept by anyone on his land. In general inevitable accident is a good defence on the ground that there is an absence of *mens rea* which the law requires before liability for a tort can be established, but there are special exceptions to the general rule.

Inevitable Mistake. Inevitable mistake is commonly no defence against civil liability though there are a few minor exceptions, none of which has any interest from our particular point of view, as, for instance, the non-liability for the mistaken arrest of an innocent person on suspicion of felony.

FOREIGN TORTS

An action will lie in England for torts committed abroad (except in cases of injury to land) provided the act was unlawful in the place where it was done and was of a kind that would have been actionable

if committed in England. In such cases the existence and measure of the liability will be in accordance with English law.

NON-NEGLIGENT LIABILITY

There are several cases in which there is what may be termed " non-negligent " liability for damage to the property of third parties. These are cases where the legislation has placed certain statutory undertakings in a privileged position in respect of damage to their property. Examples are gas, water and electricity undertakings.

VICARIOUS LIABILITY FOR THE TORTS OF OTHERS

This liability arises from the various relationships which may exist in law. The most important instances are principal and agent, and master and servant. The difference between an agent and a servant is important as it may have a material bearing on the question of liability. An agent is one who acts for another and his authority may be wide or may be restricted, according to the terms of his appointment. A servant is one who has entered into a contract of service. He is bound to obey the lawful orders of his employer. While most servants are at the same time agents for their employers, an agent is not necessarily and not usually a servant. The real relationship is a question of fact.

PRINCIPAL AND AGENT

Whenever one person employs or authorizes another to commit a tort it is imputed in law to both principal and agent and they are jointly and severally responsible for it as joint wrongdoers. The rule is *qui facit per alium facit per se* (he who does a thing by another does it himself).

Broadly speaking there is no responsibility on the part of a principal for an unauthorized tort. There must be express or implied authority by him.

If an agent commits a tort while acting on behalf of a principal but without his authority, and the principal subsequently ratifies and assents to the act so done, the principal thereby becomes responsible for it just as if he had given precedent authority for its commission. The wrongful act must, however, be done on behalf of the principal. No one can ratify an act that was not done on his behalf but on behalf of the doer himself or some other person. The principal must also know of the nature of the act unless he is content to dispense with such knowledge.

If, therefore, an act be done purely on the doer's behalf and without any subsequent assent or ratification by his principal, the doer alone is responsible. A principal is not liable if the agent fraudently or negligently does some illegal act. On the other hand an employer is responsible for the fraud of his servant.

It is a question of the scope of the authority and the subsequent ratification, which latter may be implied by the continuance of the agency.

An agent may also be liable for his principal's torts if he impliedly contracts with a third party to indemnify him.

Independent Contractors. Broadly speaking a principal is not responsible for the torts of an agent who is an independent contractor, but there are exceptions to the general rule—

(1) A principal is liable for any wrongful act he may authorize and such authorization may be either precedent to the unlawful act or by way of subsequent ratification.

(2) A principal is none the less liable for his own negligence even although the direct cause of the damage done may be the negligence of his independent contractor.

(3) A principal is responsible for his independent contractor in all cases in which that act which the contractor is engaged to do is one of the kind which the principal does at his own peril, e.g., work inherently dangerous to others or of the nature of a nuisance in respect of which the law practically requires a guarantee of safety.

(4) A principal is liable where the contractor wilfully interferes with the support afforded by the principal's land or buildings to the adjoining land or buildings, or where he engages a contractor to do in a highway some dangerous act other than the ordinary use of the highway for the purposes of passage or traffic.

In the last two cases, although the act authorized to be done by the contractor is not in itself illegal, and is not the kind of act which is a ground of absolute liability independent of all negligence, nevertheless the law permits the delegation of such work to a contractor only on the terms that the principal shall be vicariously responsible for any negligence of which the contractor is guilty in the doing of it.

The tendency of the Courts is to extend the liability of principals for the torts of independent contractors so as to curtail any inclination to plead this relationship as a means of escaping responsibility.

MASTER AND SERVANT

Though a more common relationship than that of principal and agent, it is usually not so wide in the authority which arises therefrom.

The authority is defined by the terms of the employment, either express or implied.

Liability of Master. A master is liable for any tort committed by his servant while acting within the scope of his employment. The rule is one of absolute liability on the master's part. This presumption of liability, which is irrebuttable, very often does not correspond with the facts, but the rule is probably founded on convenience. The difficulty of proving some default on the master's part would often be so great that on the whole it is better to create a legal presumption on the ground that the negligence or other torts of a servant in the execution of his master's business are either actually authorized by the master or at any rate are the result of some want of care on the master's part in the choice of competent servants or in the superintendence and control of their work.

To establish the liability, two conditions must always be proved—

(1) Relationship of master and servant.

(2) Act committed in the course of the employment and for the specified or general benefit of the master.

Temporary Servants. Temporary or even gratuitous service is sufficient to found liability. The temporary employers of a servant who has been hired out to them by his general employers, and who is under the control of such temporary employers, are liable to the servant's general employers for the servant's negligence.

Father's Liability for Children. A father may be responsible for the torts of his children if they are acting *de facto* as his servants or agents. A father is not otherwise liable for the torts of his children, but a parent may be negligent in allowing his children to be negligent, as where the plaintiff was a boy who was shot in the eye with an air gun given as a present by the defendant to his young son. Although he had promised to smash it on receiving a complaint of a broken window, yet he allowed his son to continue to use it. The Court held that as he had knowledge that his boy had used it to cause danger, he had not used such reasonable care as a prudent person ought to exercise.

More Than One Employment. A servant may have more than one employment and may have two or more masters at the same time.

Lending a Servant. A master may lend his servant to another person so that for that employment he becomes the servant of the person to whom he is lent, though for other purposes he remains the servant of the lender. The responsibility for a tort committed by him lies exclusively upon the master for whom and under whose control he was working when he did the act complained of.

On the other hand, where a servant is instructed by his employer to act for a second employer but in so acting remains under the

control of the first employer, the first employer retains the responsibility for any negligence of the servant whilst so acting in the same manner as if he were acting purely for the first employer.

Course of Employment. In order to make a master responsible for his servant's negligence it must be shown that the act was done in the course of the employment or with the master's express or implied authority. It is deemed to be so done if it is either a wrongful act authorized by the master or a wrongful and unauthorized mode of doing some act authorized by the master.

This is so even if the master has not in fact authorized the negligent act. It is sufficient to make him liable if he has put the the servant in his place to do that class of acts, and he must be answerable for the manner in which the servant has conducted himself in doing the business which it was the act of his master to place him in.

But if the negligent act is quite independent and it can be maintained that it is outside the servant's authority and employment, the master is not liable.

Prohibited Acts. Express prohibition of the act of negligence does not free the master if the type of act is within the servant's duty—in other words if the act is merely a mode of doing what the servant is employed to do.

Wilful Wrongs. A master is liable for fraud and other wilful wrongs committed by his servant as such.

Unauthorized use of Employer's Property. A master is not responsible for the negligence of his servant in the unauthorized use of the master's property.

Negligence Contemporaneous with Employment. The fact that a wrong is committed by a servant merely at a time when he is engaged in his master's business is of itself insufficient to make the master liable. It must not only be in the course of the employment but in fact arise out of the employment.

Permission Distinguished from Employment. A master is not responsible for the negligence of his servant while engaged in doing something which he is permitted to do for his own purposes but not employed to do for his master.

JOINT WRONGDOERS

Joint wrongdoers are jointly and severally responsible for the whole damage. An injured person may sue any one of them separately. for the full amount of the loss or he may sue all of them jointly In this latter case the judgment so obtained against all of them may be executed in full against any one of them.

Joint wrongdoers may be divided into three classes—

(1) *Agency*. Where one person employs, authorizes or procures another to commit a tort it is imputed in law to both principal and agent. The rule is *qui facit per alium facit per se*. They are jointly and severally responsible as joint tortfeasors.

(2) *Vicarious Liability*. A master and servant are jointly and severally liable for torts committed by the servant in the course of employment.

(3) *Common Action*. Persons who join together in some form of common action become responsible for a tort committed in the course of it, e.g., when two persons hire a conveyance and drive it negligently and cause an accident.

Not Joint Tortfeasors if Acts Independent. Persons are not joint wrongdoers merely because their independent acts have been the cause of the same wrongful damage. Where the plaintiff's house was injured by the subsidence of its foundations, caused by the excavations negligently made by A taken in conjunction with the negligence of B, a water company, leaving a water main insufficiently stopped, it was held that A and B inasmuch as their acts were independent of each other, were not joint wrongdoers. They were held severally liable for the same damage but not jointly liable.

Apportionment of Damages. Where two or more defendants are sued together as joint tortfeasors the Court may apportion the damages between them in any manner which it considers proper in view of their respective responsibility.

Measure of Damages. The measure of damages is the aggregate injury done to the plaintiff by the joint acts of the defendants, even though they have contributed to that aggregate in very different proportions.

Interest. The Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit, on the whole or any part of the damages, for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

Proceedings Against Several Tortfeasors. Judgment recovered against any tortfeasor shall not be a bar to an action against any other person who would if sued have been liable as a joint tortfeasor in respect of the same damage. If more than one action is brought by or on behalf of the person by whom the damage was suffered or for the benefit of the estate or of the wife, husband, parent or child of that person against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise), the sums recoverable under the judgments given in those actions shall not in the aggregate exceed the amount of the damages awarded by the judgment first given.

Contribution Between Joint Tortfeasors. Any tortfeasor liable in respect of damage caused by his tort may recover contribution from any other tortfeasor who is or would if sued have been liable in respect of the same damage, whether as a joint tortfeasor or otherwise, but no person is entitled to recover contribution from any person entitled to be indemnified by him in respect of the liability for which the contribution is sought.

The amount of contribution recoverable shall be such as may be found by the Court to be just and equitable, having regard to the extent of the responsibility for the damage, and the Court has power to exempt any person from liability to make contribution or to direct that the contribution to be recovered shall amount to a complete indemnity.

RIGHT OF INDEMNITY

A principal must indemnify his agent for all liability incurred by him in consequence of the act authorized being (without the knowledge of the agent) an illegal one.

A person held vicariously liable for the tort of another has a right of indemnity against that other. A master who has paid for the negligence of his servant can sue the servant for indemnity.

PERSONS JOINTLY INJURED

Where two or more persons possess a right of action in respect of one and the same injury, e.g., trespass or other wrong, to property of co-owners, they must all join in one and the same action.

This should be carefully distinguished from the case where several persons sustain injuries in the same accident.

MINORS

There is in the law of torts no age limit as exists in other branches of the law. A child is liable, and the fact that he is living at home and is supported by his parents does not make that parent liable. The child, however, may at the time be acting as the agent of his parent. A child is liable in just the same way as an adult. The standard is what would a reasonable child do or not do.

An infant can sue for any tort done to him. Infancy was no bar to the old defence of common employment.

An infant sues by his next friend and defends by his guardian *ad litem.* If the action fails the next friend is personally liable for defendant's costs but is entitled to an indemnity from the infant.

THE CROWN

The Crown Proceedings Act, 1947, which came into force on 1st January, 1948, provides that where any person has a claim against the Crown after the commencement of the Act, and if this Act had not been passed the claim might have been enforced subject to the grant of His Majesty's fiat by petition of right, then subject to the provisions of the Act the claim may be enforced as of right and without the fiat of His Majesty, by proceedings taken against the Crown.

Subject to the provisions of the Act the Crown is subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—

(*a*) in respect of torts committed by its servants or agents ;

(*b*) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer ; and

(*c*) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.

No proceedings shall, however, lie against the Crown by virtue of paragraph (*a*) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, apart from the provisions of the Act, have given rise to a cause of action in tort against that servant or agent or his estate.

Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity.

Any enactment which negatives or limits the amount of the liability of any Government department or officer of the Crown in respect of any tort committed by that department or officer, shall, in the case of proceedings against the Crown in respect of a tort committed by that department or officer, apply in relation to the Crown as it would have applied to the department or officer.

The law of indemnity and contribution is enforceable by or against the Crown as if the Crown were a private person, and the law as to contributory negligence binds the Crown.

All civil proceedings by or against the Crown are to be instituted and proceeded with in accordance with rules of court.

PUBLIC OFFICIALS

Every agent and servant of the Crown is personally responsible for all torts committed by him in the same way as any other person.

He cannot seek immunity on the ground that he did the act complained of in his public capacity or in the name and on behalf of the Crown or even by express command and authority of the executive.

The rule of vicarious liability does not apply to public officials so as to make them responsible for the acts of their subordinates. They are fellow-servants of the Crown.

OFFICIALS OF PUBLIC BODIES

Persons are not public officials merely because they are entrusted with public functions within the meaning of this rule of irresponsibility for their subordinates. In this connection the term is restricted to employees of the Crown.

FOREIGN SOVEREIGNS AND AMBASSADORS

Diplomatic agents are not liable to be sued in the English Courts unless they submit to the jurisdiction. Diplomatic privilege does not impart immunity from legal liability but only exemption from legal jurisdiction. The privilege is the privilege of the Sovereign to whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or the official superior of the agent. It is the practice of British royalty and of foreign ambassadors to effect the necessary insurances, but the principle of law is as stated.

Foreign sovereigns and ambassadors resident in this country can sue in an English Court.

LUNATICS

There does not appear to be any decision as to whether a lunatic can be liable for a tort, and it therefore may be taken that a lunatic is liable in the same way as any other person. Where a lunatic is in such a state that he cannot know what he is doing, it follows that he cannot be negligent in fact and therefore should not be deemed to be guilty of negligence in law.

A lunatic so found sues and defends by his committee, and if not so found, sues by his next friend and defends by his guardian *ad litem.*

ALIENS

An enemy alien cannot sue unless he has express or implied licence to remain in this country, but he may be sued. No such disability attaches to a friendly alien.

MARRIED WOMEN

By the Law Reform (Married Women and Tortfeasors) Act, 1935, a married woman is capable of suing and being sued either in tort or in contract or otherwise in all respects as if she were a feme-sole (viz., spinster).

For torts committed by or against a wife during marriage she is sued or sues as a feme-sole and sums recovered against her are paid out of her separate estate, and sums recovered are part of her separate estate.

As regards claims between spouses, the Married Women's Property Act, 1882, Sect. 12, provides that every married woman shall have in her own name against all persons whosoever, including her husband, the same civil remedies for the protection and security of her own property as if such property belonged to her as a feme-sole, but except as aforesaid no husband or wife shall be entitled to sue the other for a tort. A husband cannot, therefore, sue his wife for tort, and a husband of a married woman is not by reason only of his being her husband liable in respect of any tort committed by his wife, nor can he be sued or made a party to any proceedings brought in respect of any such tort.

BANKRUPTS

When a man is adjudicated bankrupt his property becomes vested in a trustee for division among his creditors, but all his rights do not pass to the trustee. Rights of action in respect of injuries to the person do not pass. Rights of action in respect of injury to the estate pass to the trustee, and rights of action which touch both the estate and the person, accrue partly to the trustee and partly to the bankrupt.

CORPORATIONS

A corporation (that is a corporation in the wider legal sense and not merely a municipal corporation) is liable for torts committed by its servants and agents provided that the thing done is—

(*a*) within the powers and for the purposes of the corporation, and

(*b*) done so that it could be actionable if done by an individual.

EXECUTORS AND ADMINISTRATORS

On the death of any person all causes of action subsisting against or vested in him survive against or for the benefit of his estate. The

only exceptions are causes of action for defamation, seduction, inducing one spouse to leave the other, or adultery.

Where the death of the deceased has been caused by the act or omission which gives rise to the cause of action, the damages recoverable for the benefit of his estate shall be calculated without reference to any loss or gain to his estate consequent on his death except that a sum in respect of funeral expenses may be included.

No proceedings shall be maintainable against the estate of a deceased person unless proceedings were pending at the date of his death or the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

The rights for the benefit of the estates of deceased persons are in addition to and not in derogation of any rights conferred on the defendants of deceased persons by the Fatal Accidents Acts, 1846 to 1908.

NEGLIGENCE

Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. In other words negligence is a breach of the duty to take care. It is the neglect to be careful when under a duty to take care.

Duty of Care. Without there being a legal duty to take care owed to the plaintiff himself there is no negligence. Negligence and duty are correlative and there is no such thing as negligence in the abstract. There must be a duty before there can be a breach.

Duty not Universal. This duty is not universal. For instance, in the case of an occupier of premises, while he owes a duty of care to persons lawfully on his premises he owes no such duty to a trespasser.

Negligence and Want of Skill. Negligence must be distinguished from want of skill. No one is bound to be skilful and competent.

A man is judged on his own capabilities of mind and body and is expected only to do his best. If he does this, it does not matter that a better man would have done more.

This must not be confused with the care of a man not possessing the necessary skill who undertakes a work requiring special skill.

Standard of Care. The standard of care required is a matter of degree. The law does not require the highest degree of care of which human nature is capable, but only that which is reasonable in the particular circumstances. In other words, it requires that care which would be exercised by an ordinary prudent man or, as it is sometimes put, a reasonably careful man.

It is not sufficient that the defendant has used as much care as he believed to be required of him. The question is whether he attained the standard of care required by the law, and what amounts to reasonable care depends entirely upon the particular circumstances. The sole standard is the ordinary prudent man.

Proof of Negligence. The burden of proof is on the plaintiff. He must produce reasonable proof of negligence or there is no case to go to the jury. The question of whether there is a case to go to the jury is decided solely on the evidence put forward by the plaintiff.

Res Ipsa Loquitur. There is one class of case where the rule that burden of proof is on the plaintiff does not obtain. Where the thing which caused the injury is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management of it use proper care, then in the absence of explanation the circumstances afford reasonable evidence that the accident happened from want of care. In other words "the thing speaks for itself."

The principle is applied only in a well-defined class of case, and the burden of proof still rests with the plaintiff in every case that cannot be brought within this rule.

CONTRIBUTORY NEGLIGENCE

A man is guilty of contributory negligence if his own want of proper care for his own safety directly contributed to the accident, even though negligence also existed on the part of the defendant. The mere fact that by care the plaintiff could have avoided the accident is no defence if his failure does not amount to culpable negligence, that is to say, to a breach of his legal duty to take care for his own safety.

In many circumstances the plaintiff is entitled to assume there is no danger and is under no obligation to ascertain whether any danger exists.

By the Law Reform (Contributory Negligence) Act, 1945, where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. Further, where two or more persons are sued, the rule as to contribution between tortfeasors will apply to them.

Where damages are recoverable by any person subject to such reduction as is before-mentioned, the Court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

Where any case is tried with a jury, the jury shall determine the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced.

The Act is silent as to costs, which will still be in the discretion of the Judge.

Contributory Negligence of Servants. The same considerations apply in the case of servants on the principle of *respondent superior*.

Contributory Negligence of Children. In the case of a child or some person under some form of personal incapacity, the measure of care exercised depends on the extent to which such care could be reasonably expected from such a person, and the criterion required would not be that of a person of mature age, experience or capacity who might reasonably be expected to use greater care.

Burden of Proof. It is always on the defendant that the burden of proving contributory negligence lies.

Independent Contractor. It is no bar to the plaintiff's claim that there was contributory negligence on the part of an independent contractor or other agent of the plaintiff for which he is not responsible.

Trespassing by Children. The long line of cases on this subject, most of which went in favour of the plaintiff, has been ended by *Hardy* v. *Central London Railway*, [1920] 3 K.B. 459, where the defendants were held not to be liable for injury to a child whilst playing on an escalator, on the ground that warnings had been unheeded by children old enough to understand them.

Volenti Non Fit Injuria. If a person expressly or impliedly consents to a certain act he cannot bring an action in respect of that act though he may be injured thereby. There must be actual consent; mere knowledge is not sufficient to debar the plaintiff even though he

makes no attempt to prevent or avoid the danger. The maxim is *volenti non fit injuria*, not *scienti non fit injuria*. Consent involves an express or implied agreement that the act may be rightly done or the danger rightly caused.

Proper recognition of the danger, even without presumption of full acquiesence by the plaintiff, of the risk may, however, affect the plaintiff's claim, for it may either negative the defendant's negligence or may infer contributory negligence by the plaintiff.

There are certain cases in which he who causes a danger fulfils all his legal duty of care by giving notice of that danger to the persons whom it affects, as for instance he who lends a chattel gratuitously to another is not bound to do more than disclose the existence of any dangerous quality of which he is aware but of which the borrower is not aware.

If the plaintiff has actual knowledge of the danger which caused the injury, then there is an absolute defence in such cases. The act of the plaintiff in knowingly running a risk created by the wrongful act of the defendant may in some cases amount to contributory negligence. What amounts to contributory negligence depends upon the particular circumstances. A man is perfectly entitled to undertake a certain amount of risk rather than be deprived of his rights by the wrongful act of another, but this does not mean he may be foolhardy at someone else's expense. The whole question is whether the danger is so obvious that the plaintiff cannot, with common prudence, make the attempt.

The maxim *volenti non fit injuria*, though in its strict sense limited to an express or implied agreement to run the risk of harm, is used in a wider sense to include mere knowledge in excluding an action in accordance with the principles already mentioned, so that in the wider sense it may be said to cover three distinct classes of case—

(1) Where the plaintiff has agreed expressly or impliedly to suffer harm or to take the risk of it.

(2) Where, because the plaintiff knows of the danger, the defendant has done no wrong in causing it.

(3) Where, because the plaintiff knows of the danger, his act in voluntarily exposing himself to it is an act of contributory negligence.

No risk, however great, can be the ground of a charge of contributory negligence if the defendant himself requested or ordered or consented to the act of the plaintiff running the risk.

NUISANCE

The basis of the law of nuisance is the maxim *sic utere tuo ut alienum non laedas*—a man must not make such use of his property

as unreasonably and unnecessarily to cause inconvenience to his neighbour.

Nuisance is of two kinds—public nuisance and private nuisance. The first is a species of criminal offence and is not within the law of torts. Private nuisance may be either the wrongful disturbance of an easement or other servitude appurtenant to land or the act of wrongfully allowing the escape of deleterious things on to another person's land, e.g., smoke, smells, fumes, electricity, water, and so on.

Though generally nuisance is in the nature of a continuing wrong, an isolated instance may be a nuisance, e.g., a gas explosion in the street.

Actionable at Suit of Owner. The right of action for nuisance is given to a man *qua* owner of land or right in connection with land. It is probably owing to the fact that the right is a proprietary one and not of a delictual character, i.e., that it arises in the main from the fact that the plaintiff owns something and not because the defendant does something wrong, that the liability is absolute.

Nuisance is actionable only by him who is in possession and injured by the nuisance. The wife of an occupier who was injured has no claim, as she possesses neither a proprietary nor a possessory interest.

Liability of Occupier. The occupier of premises is primarily liable for all nuisances which exist upon them during his occupancy. His duty is not merely to refrain from positive acts of misfeasance but to prevent any nuisance coming into existence and to abate them if they do.

The tenant is responsible if his house falls into disrepair so as to be a danger to those using the adjoining highway, and is also responsible for a nuisance which existed before he came into occupation. It is his duty to abate the nuisance.

Where the nuisance is created without the act, authority or permission of the occupier, he is not liable, as where a branch of a beech tree which had been carefully inspected a few months before broke off without warning and fell upon a motor coach. On the other hand where sewage escaped from a return drain which passed through the defendant's premises, but of the existence of which he was ignorant, it was held that, though not guilty of negligence, the occupier was liable for the effects of the nuisance.

Liability of Landlord. Though the responsibility is primarily on the occupier, liability being based on possession and the owner as such not being responsible, there are exceptions.

Where the landlord has caused the nuisance prior to the lease by a positive act of misfeasance, or where he has authorized the tenant to create or continue the nuisance, the landlord is liable, as also

where the nuisance existed at the commencement of the tenancy and the premises were let without any covenant that the tenant should put them in repair.

The landlord is liable where there is a breach by him of a covenant in the lease. The landlord's contract to repair may make him liable to persons injured outside the premises through the nuisance, but it will not make him liable to persons entering the premises.

Nuisance to a Highway. If the exercise of the public right of passage along a highway is made dangerous or is obstructed without lawful justification, this may constitute a nuisance. This wrongful act may be committed on the highway itself or on land adjoining, as for example leaving an obstruction or an excavation unlighted and unguarded even though the same had been lawfully made. Other instances are defective coal plates or cellar gratings or dangerous and defective fences.

Only Liable to Persons Using Highway. Only persons who are injured whilst using the highway can sue. For a private individual to recover he must have been injured whilst exercising the public right of passing along the highway.

Vicarious Liability. The ordinary rule *qui facit per alium facit per se* applies in the case of highways as elsewhere. A person who authorizes the doing on a highway of any dangerous act (other than the use of the highway for the ordinary purposes of passage) is liable for the negligence of the person doing such act, whether he is his servant or not. He is also liable for the negligence of any person employed or instructed by him to take the necessary precautions to prevent such dangerous work causing injury.

Hanging Lamps and Signs. Where a lamp suspended over the doorway of a house abutting on to the highway fell owing to the negligence of an independent contractor recently employed to put the lamp in repair, the occupier was held liable.

Liability not Independent of All Negligence. The liability is not independent of all negligence whatever. There must be negligence on the part of the independent contractor. Once this is established, the liability of the principal is absolute even though the defendant or his servant may not be personally negligent.

Act of Stranger. An act of a stranger done without the occupier's knowledge does not make him liable until he has knowledge or reasonable means of knowledge of the dangerous condition and allows the nuisance to continue.

Collateral Negligence. The defendant is liable for negligence of the contractor only directly in connection with the dangerous act, and not for negligence in things that he may be doing in relation

thereto. The distinction between direct negligence and collateral negligence is perhaps best illustrated by the statement that a highway authority would be liable for the negligence of a contractor who left an excavation in the highway unguarded, but would not be liable for injuries caused by carts carrying away the earth from the excavation.

Falling Trees. The question of the liability for trees which fall and cause injury was fully discussed in the case of *Noble* v. *Harrison*, [1926] 2 K.B. 332, where it was held that, having regard to the height of the bough from the ground to the place where the defect was and to all the relevant circumstances, knowledge of the defect could not be imputed to the defendant as it was latent and not discoverable by any reasonably careful inspection; and that there was no negligence.

A branch of a tree was not kept from falling by artificial attachments to be maintained by man but by the natural processes which developed the tree and it was only when accident or decay interfered that human intervention was required. The Court saw no reason for holding that the owner was to become an insurer of nature, or that default was to be imputed to him, until it appeared or would appear upon proper inspection that nature could no longer be relied upon.

Liability for Non-repair of Road. No action will lie against a local authority entrusted with the care of the highway for damage suffered as a result of their statutory duty to repair. They are not liable for nonfeasance (failure to repair) though they are liable for negligence in carrying out repairs (misfeasance). They are not liable so long as they do nothing, but once they start on the repairs they are liable for negligence in the course of the work in the same way as other people.

This exemption is confined to highway authorities and does not extend to others using the highway, e.g., a tramway undertaking. An authority may at the same time be both the highway authority and responsible for some other service, in which case they are protected only so far as the highway is concerned.

A local authority was held liable where, having charge both of the road and the sewers beneath, they allowed a sewer grating to become so worn as to become a nuisance whereby the plaintiff was injured.

To place such an artificial structure in the highway and then allow that structure, as opposed to the highway itself, to fall into disrepair is a misfeasance. A bridge is not such an artificial structure but is part of the highway, and there is no liability for its non-repair.

If the artificial structure itself is in good order but is rendered dangerous by the disrepair of the highway there is no liability.

The same principle applies if the structure is placed there by someone (provided they do so under authority) other than the

highway authority unless the person authorized to place the structure in the road is under statutory obligation to keep the adjoining portions of the road in good repair, in which case they are liable for any omission to do so.

In the area of the Metropolitan Water Board the liability for stop-cock boxes in the road is by statute placed upon the consumer. In 1932 the liability was transferred from the consumer to the Board, an exception being made in the case of stop-cocks fitted after the date of transfer to existing communication pipes.

Liability for Dangerous Chattels. Any person who invites another to make use of his chattel, e.g., ship, railway train or other conveyance, is liable for any damage that may result according to the same rules as determine the liability of an occupier of premises to persons entering upon them.

Persons to Whom the Chattel is Delivered or Entrusted. The liability depends upon the terms, express or implied, in the contract between the parties. In many contracts there is an implied warranty as to fitness. By the Sale of Goods Act, 1893, Sect. 14, there is in certain circumstances an implied warranty that the goods are fit for the purpose for which they are bought.

In a contract of hiring there is a similar implied warranty of safety and fitness and a similar liability for dangerous defects, but this does not extend to latent defects which are not discoverable by reasonable care on the part of anyone.

In a contract for the carriage of goods by a person under a statutory duty to carry, there is an implied warranty that the goods may be safely carried and are not dangerous, and if the goods are dangerous the consignor must give notice to such a carrier unless the means of knowledge that the goods are dangerous are equally open to both parties.

In other contracts there is in general no implied warranty but merely a duty to use care, so that the defendant is not liable except for the negligence of himself and his servants.

In the case of a gratuitous loan or gift of a chattel there is not even a duty to take reasonable care, but in a contract of gratuitous service, such as taking a friend for a drive, there is such a duty.

Persons other than the Recipient. If the defendant fraudulently represents the chattel to be safe and so misleads the recipient into causing damage to the plaintiff, as where a father bought his son a gun which exploded and injured him, the defendant is responsible. If the defendant has actual knowledge of the dangerous nature of the chattel and gives no warning of it to the recipient, he is likewise liable for resulting injury to third parties. A defendant is also liable if he has been guilty of an act of negligent misfeasance in actually creating

the source of danger and not merely of the nonfeasance of omitting to make the chattel safe or to ascertain whether it was safe or not.

Owners and Occupiers of Premises. Injuries to persons outside the premises, caused by defects in the premises, fall within the tort of nuisance which has already been dealt with. The case of accidents on the premises will be dealt with in the chapter on Property Owners' Indemnity.

LIABILITY FOR ANIMALS

The law as to an owner's liability for damage done by animals is divided into two distinct branches. One is that of trespass and the other that which imposes upon the owner of a dangerous animal or thing the duty to take measures to prevent its doing damage.

Straying Animals. With regard to dangers from the ordinary use of the highway for the purposes of traffic it is for the adjoining occupiers to guard against them. Where cattle which are being driven along the highway enter the open doorway of a shop there is no liability.

Cattle Trespass. It is the duty of the owner of any animal in which by law the right of property can exist, to take care that it does not stray on to a neighbour's land, and he is consequently liable for any trespass it may commit and for the consequences of such trespass.

Keeping in Cattle. The duty is an absolute one, and whether the escape was due to negligence or not is immaterial.

If a man's cattle or sheep or poultry stray on to a neighbour's land or garden and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his neighbour for the consequences. Subject to the ordinary rules as to remoteness of damage, the owner is absolutely liable for the damage caused by the trespass of his animals. The animals' propensity to do the particular kind of damage which was done is relevant as showing that the injury is a direct result of the trespass and so precluding the defence that the damage was too remote. This rule must be carefully distinguished from the doctrine of *scienter* in the case of dangerous animals.

Plaintiff's Neglect to Fence. When the trespass is due to the plaintiff's neglect to fence, it is necessary to ascertain whether his responsibility to provide a fence is—

(*a*) under covenant, i.e., a condition of the agreement relating to his occupation of the land by which he is bound ; or

(*b*) under statute.

If his responsibility is under covenant his failure to repair is no effectual answer to a claim he may bring for the trespass which may

result from it, but if he is responsible by statute the failure to fence affords the defendant a good defence.

Neglect of Third Parties. Where the trespass is due to the unlawful act of a third party the defendant is still liable, following a very old decision.

Straying from Highway. There is one exception to the rule of absolute liability for cattle trespass. It does not apply to animals straying from the highway. In such cases negligence must be proved. It is the duty of occupiers of land or premises adjoining a highway to guard themselves, by adequate fencing, against the entry of such animals.

Dogs and Cats Trespassing. An owner is not, however, liable for the trespass of all animals *mansuetae naturae*. It is settled law that for the trespasses of dogs and cats an owner is not liable. The underlying principle is that trespass by horses and cattle will invariably cause some damage even if only to the extent of what they will eat, but not so a cat or a dog. The owner of a cat which trespasses and eats his neighbour's pigeons is not responsible. The class of animals which may trespass with impunity is not a fixed one, and the Courts may add to it in future cases.

Animals Mansuetae Naturae. Unless it is proved from the known propensities of the particular animal that it is within the category of dangerous animals, the owner is not responsible for damage caused by it except in the case of land trespass or in cases other than trespass where it is proved that the defendant or his servants had actual knowledge that the particular animal had vicious or dangerous qualities.

Animals Whose Characters are Unknown. There is no liability in respect of animals whose individual characters are not known, e.g., bees, sheep.

Owner Liable for Negligence. Runaway Horse. The owner of an animal is liable when negligence on his part can be shown. It is prima facie negligence to leave a horse unattended in the street if there is any likelihood on its part to bolt and cause damage. There is no absolute liability as, generally speaking, it is not in the nature of horses to bolt, and when there is no reasonable probability of this occurring a horse may be left unattended without the owner incurring liability.

Straying on Highway. Allowing animals to stray unattended on the highway is not of itself evidence of negligence.

Driving Sheep at Night. Driving sheep at night without a light is not of itself negligence.

Wild Beasts. There is nothing unlawful in keeping wild beasts, but it is done subject to the rule of absolute liability.

The absolute liability of the keeper of the animals may be excluded by—

(1) Escape of animal by Act of God.

(2) Plaintiff trespassing.

(3) *Volenti non fit injuria.*

Rule of Absolute Liability. Liability for the harm done by animals is subject to a special rule which is not applicable to other forms of dangerous property. The owner is not under any obligation to find out whether it is dangerous or not. He is responsible for dangers which he knows of, not for those which he might have ascertained by inquiry. Unless he has knowledge to the contrary he is entitled to assume that an animal will do no harm. The knowledge which is thus an essential condition of liability for the acts of animals is either knowledge proved as a fact in the individual case or knowledge conclusively presumed by law from the fact that the act done by the animal is of a kind which animals of that species have a natural tendency to commit. In other words all harm done by animals is either

(*a*) harm which is natural to that species of animals, or

(*b*) harm which is not natural to the species but which is nevertheless done by the particular animal in question.

In the first case the owner is not permitted to allege that he did not know of its tendency to do mischief. He is conclusively presumed to have known the ordinary character of that species of animal, and it is no defence to him that he had good reason to believe that the individual animal had no tendency to do such harm although natural to the species.

Proof of Scienter. In the second case the plaintiff must prove actual knowledge on the part of the defendant of the tendency of the individual animal to do the harm which it did. This is called " proof of *scienter* " from the term " *scienter* " used in the old writ in which the defendant was charged with knowingly keeping a dangerous animal.

In the case of cattle it is a natural tendency to stray and trespass and to tread down crops, as also it is the natural tendency for wild animals such as tigers to attack mankind and other animals. The owner is presumed by law to have knowledge of these natural tendencies. This presumption is conclusive even to the extent that evidence that the individual animal was reasonably believed not to have the usual tendencies of its kind is excluded.

Horses and Dogs. It has been judicially decided that it is not the natural tendency of horses and dogs to bite human beings, and it is accordingly necessary to prove that the owner or his servant knew that the animal was dangerous, viz., had departed from the peaceable

habits of its species. This is usually done by proving that the dog had previously bitten another person, hence the popular saying that a dog is entitled to its first bite.

It is not necessary to prove that the animal has on a previous occasion actually done the kind of harm now complained of. It is sufficient to prove it has manifested a tendency to do such harm, and the defendant or his servant was aware of the fact.

Horses and dogs are not assumed in law to have a tendency to bite human beings, and therefore it is necessary to show not only that the tendency existed but that the defendant or his servant knew that it existed. To prove that he had the means of knowing this and would have known it had he exercised reasonable care is not sufficient, nor is the fact that a horse was known to bite other horses sufficient to make the owner liable when it bit a passer-by.

Difference Between Wild and Domestic Animals. In the case of animals wild by nature, the law presumes knowledge on the part of the owner that the animal is dangerous because of its natural tendencies, and the owner cannot plead in defence that he had exercised care. In the case of other animals, knowledge of the tendency must be proved and no claim can be founded on negligence.

Whether Mischief is Natural. It is a question of law and not of fact whether any particular kind of mischief is the natural tendency of any particular species of animal or not.

Dogs Act, 1906. It was deemed at common law not to be the nature of dogs to attack cattle and in such cases proof of *scienter* was required, but the Dogs Act, 1906, provides that " the owner of a dog shall be liable in damages for injury done to any cattle by that dog and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog or the owner's knowledge of such previous propensity or to show that the injury was attributable to neglect on the part of the owner." The term " cattle " includes horses, mules, asses, sheep, goats, swine and (by the Dogs (Amendment) Act, 1928) poultry. Poultry has the meaning assigned to it by the Poultry Act, 1911, and includes domestic fowls, turkeys, geese, ducks, guinea fowls, and pigeons. In respect of all other kinds of mischief done by dogs, the common law rule as to liability stands.

Different Rule in Contract. This exemption of the owner of an animal from all duty of care does not extend to the law of contract. It exists in the law of tort only. If a person undertakes by contract any duty of care in respect of the person or property of another, he must take due care to prevent damage by mischievous animals, and no proof of *scienter* is necessary.

Damage May Be Too Remote. Though the act may be natural to the species or known to be in the nature of the individual animal, the damage resulting may be too remote, as for instance where a dog jumped over a wall into a garden and fell down a well on to the plaintiff who was at the bottom of it.

Absolute Responsibility for Dangerous Animals. A person who keeps a dangerous animal is absolutely responsible for its acts provided he has the necessary knowledge of the danger. He must prevent its escaping or in any way exercising its dangerous instincts, and is liable for any harm it does without any necessity for proof of negligence in the custody of the animal. This rule was established in the case of *May* v. *Burdett* (1846), 9 Q.B. 101, where the animal in question was a monkey.

SCHOOL RISKS

It should be remembered that the degree of care required is far greater in dealing with children than in the case of the public generally, and what would not be negligence in the case of the adult public may very well constitute negligence in the case of young children. What may amount to contributory negligence in the case of an adult will not do so in the case of young children.

PROFESSIONAL INDEMNITIES

Apart from the special privileges and limitations of the Bar, every professional man owes to his clients a special duty expressed in the maxim *spondet peritiam artis*. A person holding himself out to do certain work impliedly warrants his possession of skill reasonably competent for its performance. If he has not that skill he is liable for negligence. He must exercise such skill and care as an average prudent man in his profession would exercise in the circumstances. He need not show exceptional ability as a rule. Generally speaking the principle applies equally to work done gratuitously as to work for which a fee is charged. You are not bound to do work for nothing, but if you do you are liable for negligence if you fail to exercise reasonable care and skill. If reasonable care and skill is exercised, a mere error of judgment on a difficult matter is not sufficient to ground a liability. The test is whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion. The standard required is a minimum. A man is not legally bound in a difficult case to act up to the best of his abilities if they are above the average but only up to the average standard of competent men in his profession.

INJURIES TO THE PERSON

The Fatal Accidents Act, 1846, generally known as Lord Campbell's Act, gives the relatives of a deceased, if they have suffered pecuniary loss in consequence of his death, a similar right to damages as the deceased would have had if he had lived.

The relatives thus protected are husband, wife, children, grandchildren, stepchildren, father, mother, step-parents. Illegitimate children, adopted children and posthumous children are now within the Act.

The Act provides that the action shall be brought by and in the name of the executor or administrator of the deceased, but if the legal personal representatives fail to bring the action the Fatal Accidents Act, 1864, gives the dependents themselves a right of action.

The Law Reform (Miscellaneous Provisions) Act, 1934, provides that on the death of any person all causes of action (except claims for defamation, seduction or adultery) subsisting against or vested in him shall survive against or as the case may be for the benefit of his estate. Damages recovered under this Act are to be set off against damages recoverable under the Fatal Accidents Acts.

Division of the Amount Recovered. It is for the jury to apportion the amount awarded between the different relatives. In the case of a settlement without trial proceedings may be instituted for the apportionment to be made by the Court.

Damages not Part of Estate. The amount recovered does not form part of the deceased's estate so as to be liable for his debts. The executor recovers, not in his ordinary capacity of legal personal representative, but in a special capacity in right of the relatives.

Similar Rights to Deceased. The rights of the relatives are similar to those of the deceased—in fact they are his rights passed on to the relatives. There is no right of action unless the deceased himself could have sued had he been injured only by the defendant's negligence and not killed. If he has before his death accepted a sum in full discharge, his relatives cannot sue in respect of his death.

The same defences are available against the relatives as would have been available against the deceased had he lived. The defence of contributory negligence, *volenti non fit injuria*, or the Limitation Act, 1939, may be set up.

Must Show Pecuniary Loss. No relative can claim who cannot show pecuniary loss as a result of the deceased's death.

Assurance Policy Moneys. By the Fatal Accidents (Damages) Act, 1908, it is provided that in assessing damages " there shall not be taken into account any sum payable on the death of the deceased under any contract of assurance or insurance."

Concurrent Rights of Action. Where notwithstanding the maxim *actio personalis moritur cum persona* the deceased had a cause of action which survives him, his legal personal representative has a right of action on behalf of the deceased's estate as well as in his special capacity on behalf of the relatives.

PERSONAL INJURY

It is an actionable wrong to cause bodily harm to another person either negligently, or in breach of a duty to use care for the safety of that person, or accidentally in those cases in which the law imposes absolute liability.

Personal injury includes illness due to nervous shock, and also physical pain even though unaccompanied by any bodily lesion or illness, but mere mental suffering such as fear will not support an action. Mental pain or anxiety the law cannot value and does not pretend to redress.

Liability for Indirect Injuries. If as the result of the defendant's negligence indirect injuries are caused, the defendant is liable, as where a wife saw her husband injured by falling glass and in attempting to rescue him strained herself and restarted thrombosis.

DAMAGES

Damages are divided into *General Damages*, that is, the kind of damage which the law presumes to follow naturally from the wrong complained of and which need not be specified in the plaintiff's pleadings, and *Special Damages* which the law does not presume naturally to follow from the defendant's wrongdoing and which must be specially alleged in the pleadings, such as loss of earnings, medical expenses, cost of nursing, extra nourishment, etc. Unless these are expressly alleged in the pleadings so that the defendant has notice of them, the plaintiff is not permitted to give evidence of them nor will the jury be permitted to make any award in respect thereof.

Remoteness of Damage. The liability for the consequence of a wrongful or negligent default, once established, is not limited to consequences which might have been reasonably anticipated.

Damages Must be Reasonable. The amount awarded must be a reasonable compensation to the plaintiff. For example, in an action arising out of an accident the plaintiff usually claims for three items—

(1) Necessary expenses incurred.
(2) Loss of earnings and earning capacity.
(3) Pain and suffering.

On the first item the jury ought to take the financial and social position of the plaintiff into account; on the second item they may or may not do so according to the circumstances, but on the third they ought not to do so.

Damages Only an Indemnity. The defendant is not bound to pay the plaintiff for a new thing to replace an old one which has been destroyed. He is liable only for the damage actually sustained, viz., the value of the thing at the time it was destroyed or the cost of repairing it if only damaged.

Plaintiff Must Mitigate Loss. The plaintiff must not only not augment the loss; he is also bound to do all he reasonably can to mitigate it, and if he succeeds in so doing, the measure of damage is the actual loss although, if the plaintiff had done nothing, the loss would have been greater.

Unreasonable Amount of Damages. If the jury exercise their duty fairly and reasonably their verdict will not be upset even though the Court disagrees with their estimate. The Court will, however, order a new trial if the damages awarded are so large that no twelve reasonable men could have given them, it being clear that the jury were influenced by undue motives or considerations to which they should not pay attention, or were under a misconception of the facts. In the same way if the damages are inadequate, this being clearly due to a mistake in calculation or misconduct on the part of the jury, the Court will order a new trial.

Successive Actions on the Same Facts. Not more than one action will lie on the same cause of action. All damages resulting from the same cause of action must be recovered at one and the same time. When there are two or more causes of action, as distinct from two or more heads of damage, successive actions will lie in respect of each of them.

Cannot Sue Again for Unexpected Consequences. When a person has recovered damages he cannot sue again in respect of unexpected consequences which have developed afterwards, and for that reason the jury must take the expectation of future loss into account.

Damages for Nervous Shock. The case of *Hambrook* v. *Stokes Bros. Ltd.*, [1925] 1 K.B. 141; 94 L.J.K.B. 435 has now definitely laid it down that damages are recoverable for nervous shock, Sargent, L. J., in giving judgment said "There seems to me to be no magic in actual personal contact."

LIMITATION OF ACTIONS

The Limitation Act, 1939, provides that an action must be commenced within six years after the cause of action has arisen.

The period runs from the time when a complete and available cause of action first comes into existence. As negligence is a wrong which is not actionable without actual damage, the period of limitation does not begin to run until damage happens.

If on the date when any right of action accrued the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years or, in the case of public authorities, one year from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation of six years has expired.

The disability, minority or lunacy, must exist at the time when the cause of action first arises. If the statute has once commenced to run no subsequent insanity will have any effect.

If when the cause of action first arises the defendant is absent from the United Kingdom, the period of limitation does not begin until the defendant comes into the kingdom. Once the period has commenced, subsequent absence of the defendant beyond the seas has no effect.

The period of limitation for public authorities in England is now, by the above Act, twelve months. The period of limitation in respect of actions by personal representatives has already been dealt with.

The Maritime Conventions Act, 1911, provides for a limit of two years upon claims in respect of damage to a vessel or her cargo or in respect of loss of life or personal injuries suffered by any person on board a vessel caused by the fault of any other vessel.

FUNERAL EXPENSES

The Law Reform (Miscellaneous Provisions) Act, 1934, provides that a claim may be made for funeral expenses.

LIABILITY FOR FIRE

At common law a person is liable if a fire starts on his premises and causes damage to his neighbour. He may be liable—

(1) merely if the fire started on his premises,

(2) if the fire was caused by some wilful act, and

(3) if it was within the principle known as the rule in *Rylands* v. *Fletcher* (1868), 3 H.L. App. 330.

This principle has been modified by the Fire Prevention (Metropolis) Act, 1774, which excludes the liability of the person in whose house or other building a fire began by accident. The statute

does not touch the other heads of common law liability. The Act is of general application and not limited locally.

A master is liable for damage done by a fire which is caused by the negligence of his servant, but the negligence must be connected with the work which the servant is employed to do. A master is not liable if the fire is caused by the servant whilst acting outside the scope of his authority.

In this connection a motor car is a potential danger, and the owner must prevent it becoming a real danger at his peril. Traction engines and steam lorries are legally a nuisance and the owners are liable for damage done by them even in the absence of negligence.

The Railway Fires Acts, 1905 to 1923, provided that railway companies shall be liable to the extent of £200 for damage done to agricultural land or crops by the escape of sparks and cinders from locomotives. An action under the Acts is limited to £200 even if the total damage is in excess. Notice of claim must be given within seven days of the fire. The balance over £200 may be recovered on proof of negligence.

ASSIGNMENT OF RIGHT OF ACTION FOR TORT

The assignment of a right of action for a tort is in general illegal and void. This rule does not affect the company's right of subrogation although this right is a right of action for a tort.

CHAPTER IV

BURGLARY AND "ALL RISKS" CLAIMS

THIS is the one class of Accident business where the services of independent loss assessors are frequently used, but even so there are a great many claims which are handled by the company's officials.

The reason for sending the claims to assessors is probably because the insurance is analagous to fire insurance and so the fire practice is followed.

If the claim goes to a loss assessor there is little to be done by the office staff beyond the payment of the agreed amount and the necessary accounting and statistical entries. These matters have already been sufficiently dealt with.

When the case is dealt with by the company's officials it is often very desirable to have the assistance of experts to deal with the valuation of jewellery, furs, pictures, stock, etc.

It is often found that policyholders do not know the value of their property, and a jeweller who has a good stock can be of the greatest possible assistance by allowing the owner to pick out an article similar to that lost. The question of value is then very easily settled to the satisfaction of all parties, and the position is even more satisfactory if the claimant is willing to take a replacement because the jeweller will generally allow the company a substantial discount.

On receipt of notification of loss, a claim form is at once issued, but as it may well be some time before the insured is able to ascertain the full extent of his loss and formulate his claim, it is well not to wait for the return of the form but to proceed with the investigation at once.

The claim forms used differ with the different companies but those given on pages 77-80 may be regarded as typical.

An early call should be made in order to ascertain what evidence there is that the loss occurred through burglary, housebreaking or larceny, as the case may be.

If the Police have not been notified, it is essential that they should be advised at the earliest possible moment. In many cases the occurrence will have been discovered by the Police, but in the case of private houses it may not be so. At one time a reluctance to notify the Police was occasionally met with but the public have now come to appreciate the Police at their true worth and seek their help on all occasions.

So far as the company is concerned it is a *sine qua non* that the matter be reported to the Police. No arguments that they will not catch the thief or recover the property should be accepted. The Police ask, for very good reasons, that everything should be reported, and the great probability is that the thief will fall into their hands sooner or later.

If some person in the household is concerned in the theft, the fact that the Police are making enquiries has often resulted in the articles being returned to their accustomed places.

It is also a proof of the genuineness of the claim. A fraudulent claimant would not be very anxious to tell a false story to the Police.

The Police officer in charge of the case should be interviewed and a comparison made between the particulars and values supplied to them and those furnished to the company.

It should be further ascertained whether the case has been reported to them as one of theft or accidental loss, and in what category they have recorded it. It will be quite easy to decide whether the Police are satisfied as to the genuineness.

When interviewing the insured the following points should be borne in mind—

(1) Whether you are reasonably satisfied that a loss by burglary or housebreaking (or larceny if covered by the policy) has been established.

(2) Whether the premises where the loss occurred are covered by the policy.

(3) Whether the premises or part thereof were sub-let at the time of the loss.

(4) If the loss occurred at an hotel—

(*a*) Has a claim been lodged against the hotel proprietor ?

(*b*) Was there contributory negligence on insured's part, e.g. was key provided and not used or article left in insecure place ?

(5) In case of damage to premises is insured (if tenant) liable under the tenancy agreement to repair ?

(6) Does the property belong to the insured or to some other person covered by the policy ? If some other person, has he a policy covering the property ? The insured may be claiming on behalf of a visitor who may have a separate policy, or the insured may be a visitor and his host may have a policy applicable.

(7) Whether there is any other insurance which can be brought into contribution.

There may be a policy covering specified articles, in which case a " general " policy may exclude such articles.

The policy may cover specific articles, but there may be in force a " general " burglary, combined, or comprehensive policy

which does not exclude the specific articles and which may therefore be liable to contribute.

Articles stolen at schools, laundries, business premises, etc., may be covered separately.

(8) Whether any warranty which the insured may have given as to the value of his household goods or stock has been complied with—in other words whether there is under-insurance. Is the policy subject to average ? Does the sum insured represent full value of the contents ?

(9) Whether books have been kept in compliance with the policy conditions.

(10) Whether the amounts claimed for any articles exceed the limit provided by the policy.

(11) Has a thorough search of the premises been made to ensure that none of the articles claimed for has been mislaid ?

(12) Do you consider that any person living on the premises or having access thereto is implicated ?

(13) If a valuable article has been lost has it been advertised and a reward offered—

(*a*) In the local press ?

(*b*) By notices at the Police station ?

(*c*) By notice in other customary places ?

If the reward is offered at the request of the insurance company it is customary for the company to pay the reward (usually 10 per cent of value) and the cost of advertising.

(14) (*a*) Insured should be asked when and how he acquired the lost property.

(*b*) Can he produce receipts for any items ?

(*c*) Is the claim based on value at the time of the loss, i.e., replacement value less a reasonable allowance for depreciation (if any) due to age and wear and tear ?

(*d*) Do particulars and values correspond with the Police list ?

(*e*) If any articles have been recovered, does an inspection indicate that the amounts claimed are reasonable ?

If necessary the insured's idea of values can be tested by asking him to put a figure on similar articles in the house if there are any left.

(*f*) Are you satisfied as to the bona fides of the insured ?

(15) Have you suggested any precautions being taken for the future ? Have you made a note to see that these are given effect to ?

Some of these points apply to private house claims, some to business premises claims, and some to " all risks " claims, and some to all three. To have set them out separately would have meant a good deal of repetition.

BURGLARY CLAIM FORM

1. Insured's name and address	
2. Business Address .. .. Occupation	Telephone No.....
3. Address of premises where theft occurred .. .. (*State whether private house, sale-shop, flat, hotel, etc., or outbuilding thereof*).	
4. (*a*) Date and time of theft .. (*b*) When discovered, and by whom .. .. .. (*c*) How committed .. .. (*Give details of articles stolen and property damaged on the other side hereof*).	
5. When were the Police notified, and at what Station ? ..	
6. If there is no evidence of theft, or of forcible entry of the premises, has a thorough search been made for the articles missing ?	
7. (*a*) Where the premises occupied at the time of the theft ? .. .. .. (*b*) If not, on what date and at what hour were they last occupied ?	
8. Are you (*a*) Owner of the premises ? (*b*) Responsible for repairs ?	
9. Have you ever before sustained loss by theft ? .. (*If so, please state particulars*).	
10. Are you insured against the present loss under any other policy, *e.g.*, All Risks, Passengers' Baggage, Motor Car, Golfers, etc. ?	

I declare that all statements made on this form are true to the best of my knowledge and belief and that the articles and property described belong to the persons named, no other person having any interest therein, whether as Owner, Mortgagee, Trustee or otherwise.

DATE.....19.... INSURED'S SIGNATURE } .....

A Burglary Policy being a contract of INDEMNITY all claims must be based upon the actual value of the articles at the time of the Theft, due allowance being made for depreciation and wear and tear.

Full description of article stolen or property damaged	To whom the article or property belonged	From whom purchased or received (*Name and address*)	Date purchased or received	Cost £	Cost s.	Cost d.	Deduction for depreciation, and wear and tear £	Deduction for depreciation, and wear and tear s.	Deduction for depreciation, and wear and tear d.
		TOTAL							
		Deduction for Depreciation and Wear and Tear .							
		Net Amount claimed £							

They are not exhaustive. There are many more questions that may have to be asked (it all depends upon the circumstances of the particular case) but these will serve to bring out the main features of the claim and can be supplemented as and when necessary.

The policy is one of indemnity and the value of the property at the time of the loss, and not its sentimental value, is all that can be claimed. Few private insured are in a position to produce receipts or other written evidence of value, and some have rather hazy ideas of values. The cost of replacement, less an allowance for depreciation according to the age and character of the article, is a measure of value.

In the case of business insurances the insured is entitled only to trade cost and not to selling prices.

Articles recovered after payment of the loss are the property of the company. The insured is generally willing to take them back and refund the amount paid. But where the insured is reluctant to take back clothing or the like, then the only thing to do is to realize the salvage for the best price obtainable.

On payment of a claim under a burglary policy the sums insured by the various items affected are reduced by the sum paid, so that in the event of a second loss before the renewal of the policy the amount available is diminished unless the items have been reinstated to their original figures by payment of the necessary additional premium.

"ALL RISKS" CLAIM FORM

1. Insured's Name and Address ..	
2. Address of premises, or place, where loss occurred .. .. (*If lost from premises state whether private house, flat, hotel, sale-shop, etc.*)	
3. Full particulars of circumstances surrounding the loss (*Give details of articles on the other side hereof*).	
4. (*a*) Date and time when loss was discovered .. .. (*b*) By whom was loss discovered ? .. .. .. (*c*) Date and time when article(s) last seen .. (*d*) By whom last seen, and where ?	
5. When were the Police notified, and at what Station ? ..	
6. Has a thorough search been made for the article(s) ? ..	
7. Has the loss been advertised ?	
8. Have you ever before sustained— .. .. .. (*a*) Loss by theft ? .. .. (*b*) Loss of, or damage to, any article of value from any other cause ? .. (*If so, please state particulars*).	
9. (*a*) Are you insured against Burglary, Theft, Loss or Damage, with any other company or underwriter ? (*b*) If so, state particulars .	

I declare that all statements made on this form are true to the best of my knowledge and belief and that the articles and property described belong to the persons named, no other person having any interest therein, whether as Owner, Mortgagee, Trustee or otherwise.

DATE.....19.... INSURED'S SIGNATURE }.....

An All Risks Policy being a contract of INDEMNITY, all claims must be based upon the actual value of the articles at the time of the Theft, Loss or Damage, but not exceeding the sums for which they are respectively insured, due allowance being made for wear and tear.

Full description of article	To whom the article belonged	From whom purchased or received (*Name and Address*)	Date purchased or received	Cost £	Cost s.	Cost d.	Deduction for wear and tear and depreciation £	Deduction for wear and tear and depreciation s.	Deduction for wear and tear and depreciation d.
		TOTAL							
		Deduction for depreciation and Wear and Tear							
		Net Amount claimed £							

The policy does not define the terms burglary, housebreaking, and larceny, and the insured is therefore entitled to the full legal interpretation of these terms which is in some respects wider than the popular meaning.

By the Larceny Act, 1916, Sect. 25, burglary is defined as follows—

" Every person who in the night—

(1) Breaks and enters the dwelling house of another with intent to commit any felony therein, or

(2) Breaks out of the dwelling-house of another having—

(*a*) entered the said dwelling-house with intent to commit any felony therein, or

(*b*) committed any felony in the said dwelling-house, shall be guilty of felony called burglary."

Certain features of this definition call for some amplification.

The Time. Burglary can only be committed at night, and the Larceny Act, 1861, Sect. 1, defines night for this purpose as the period between 9 p.m. and 6 a.m., either Greenwich mean time or Summer time as the case may be. The breaking and the entry need not be made on the same night nor by the same person but if the breaking precedes the entering both must take place at night. If the entry precedes the breaking, the entry need not be at night, otherwise it is not a burglary.

The Breaking. By breaking is meant the actual creation of an aperture, which in itself implies the use of force. There are two kinds of breaking, actual and constructive.

Actual breaking is when some part of the premises is actually broken. This occurs when a door is forced or a window is broken, but it is actual breaking in law when the burglar creates any aperture though force is not used. It is actual breaking to open a closed door or window, even though these were not secured by locks or fastenings. But it is not breaking, either actual or constructive, to push open a door standing ajar or to open wider a partly open widow, for here the burglar is not creating an aperture but merely enlarging an already existing one.

Constructive breaking occurs when the burglar does not create the aperture himself but procures it by some unlawful means, as by collusion or fraud or a trick. Entry down a chimney or other necessary aperture is constructive breaking, and this is the only example of breaking where the burglar uses an already existing aperture.

The breaking need not be of the outside of the premises only. It is still breaking if only inner doors be forced.

The Entry. Entry is effected even though the burglar does not enter with the whole of his body. The insertion of any part of his person into the aperture will suffice. It is entry if only an instrument held in the burglar's hand is inserted, provided that this is used either to threaten somebody or to abstract property.

The Place. The place must be a dwelling-house, by which is meant premises in which some person habitually resides and which he uses as his home. It need not be a private dwelling-house as it will be just as much a dwelling-house even though a business is carried on in some portion of the same building, but someone must habitually reside and sleep there. The fact that there is a caretaker on the premises has been held not to be sufficient. It must be a permanent structure and not a caravan or tent, even though habitually dwelt in.

Dwelling-house includes out-buildings belonging thereto provided that—

(1) They communicate with the dwelling either immediately or by means of a covered and enclosed passage.

(2) They are in the same occupation.

(3) They stand within the curtilage, i.e., the plot of ground surrounding the house.

Burglary can only be committed in the dwelling of another; a person cannot burgle his own house. A landlord can only burgle rooms occupied by his tenants or lodgers if he does not live in the same house or living in the same house enters by a separate door.

The Intent. An intention to commit any felony will suffice, but so far as burglary insurance is concerned the only felony that need be considered is larceny, but it is conceivable that other felonies might give rise to a claim under a burglary policy in respect of damage to property. Under the statutory definition of burglary there may be either breaking in or breaking out. Where there is breaking in, a mere intent will constitute burglary even though no felony is in fact committed. Further, if a person enters premises without any breaking but with felonious intent, it will become a burglary, if he subsequently breaks out, but if he enters without either breaking or felonious intent, a subsequent breaking out will not be a burglary unless in fact an actual felony has been committed.

The definition of housebreaking follows that of burglary, and broadly speaking, any forcible entry of premises which is not a burglary will be a housebreaking.

It is housebreaking to break and enter the dwelling-house of another by day. If the crime is committed at night it is burglary.

The crime of housebreaking was originally confined to dwelling-houses, but by statute it has been extended to other buildings, and it is housebreaking to break into any building other than a dwelling-house, whether the offence be committed by day or by night.

The crime is sometimes termed shopbreaking or office breaking according to circumstances. In the case of a church it is sacrilege.

The remaining essential features of housebreaking—the breaking, the entry, the intention—are the same as for burglary.

Larceny has now been made a statutory offence, and the Larceny Act, 1916, Sect. 1, provides that a person steals " who without the consent of the owner fraudulently and without a claim of right made in good faith takes and carries away anything capable of being stolen with the intent at the time of such taking permanently to deprive the owner thereof."

There are several points in this definition that need some amplification—

(1) *Without the consent of the owner.* If the property is handed over with the consent of the owner or his authorized agent there is no larceny unless that consent is obtained—

(*a*) By intimidation. The threat of violence nullifies the consent.

(*b*) By fraud. This is not a genuine consent.

(*c*) By a trick.

It is larceny by a trick if possession of property is obtained on a pretence of hiring it or of purchasing it.

It is larceny also where the owner willingly hands over the possession of a thing without intending to part with his property

therein, provided that the person who receives possession then and there forms an intention to misappropriate the property.

Where property is handed over to a bailee, as when a watch is left with a watchmaker for repair, a misappropriation by the bailee will constitute a larceny provided the bailee is bound to return the actual articles itself and not merely its value. It was held in *Century Bank of City of New York* v. *Mountain* (1914), 112 L.T. 484, that larceny by a trick falls within the scope of an ordinary policy.

(2) *Without a claim of right.* A bona fide claim to the property will defeat an allegation of larceny even though that claim is eventually proved to be bad.

(3) *Takes and carries away.* Taking is of two kinds, viz., actual, where the property is removed from its owner's possession, and constructive where the owner hands over the property without intending to part with the possession in a legal sense. An example of this would be if a man gives his plate into the care of his butler. A finder of lost property takes it out of the owner's possession if, at the time of finding, he keeps the property when he believes that the owner could be found by taking reasonable steps to that end.

Carrying away is fulfilled in law if the property is moved from the place which it occupied before and severed from everything which connected it with that place. This is known as "asportation." To grasp an article alone is not asportation; it must be removed, though the slightest degree of removal will suffice. Without asportation the offence is not larceny but is an attempt to steal.

(4) *Anything capable of being stolen.* Things which are not larcenable in law comprise—

(*a*) Land and anything attached thereto, including buildings or growing things and things under the ground such as minerals.

(*b*) *Res nullius*, i.e., things with no owner, including derelict and abandoned property and wild animals.

(*c*) Things of little or no value.

This applies to things of such trifling value that the law cannot take account of them, such as a cat or dog or other domestic pet unless, of course, they are valuable pedigree animals.

There may be theft of things not capable of being stolen, but such theft does not amount to larceny because such things are not larcenable either at common law or under statute.

(5) *Intent to deprive the owner thereof.* A felonious intention must have for its purpose to deprive the owner permanently of his property. The property must be taken *animo furandi*, with the intention of stealing it.

CHAPTER V

FIDELITY GUARANTEE CLAIMS

THE cover provided by the various policies and bonds issued in the fidelity guarantee department differs widely, and it is necessary to deal with each class separately.

The ordinary commercial form was originally drawn up to cover loss to the employer by reason of larceny or embezzlement committed by the person insured. The modern policy amplifies the cover and includes loss of money or goods by larceny, embezzlement, conversion, theft, fraud or dishonesty.

Neither fraud nor dishonesty are words that convey a very definite legal meaning but they are wide in their application and cover all the circumstances to which the policy is intended to apply. The legal definitions of larceny and embezzlement are therefore now but of academic interest. The first statutory definition of larceny is provided by Sect. 1 of the Larceny Act, 1916, which provides that " a person steals who without consent of the owner fraudulently and without a claim of right made in good faith takes and carries away anything capable of being stolen with the intent at the time of such taking permanently to deprive the owner thereof." The same Act, by Sect. 17, provides that a person is guilty of embezzlement who misappropriates money for or in the name or on account of his employer. Thus if a cashier, having charge of his employer's money in a till, steals some of the money he is guilty of larceny, but if a customer hands money to the cashier over the counter and he puts it straight into his pocket he is guilty of embezzlement.

The insurance company is bound to indemnify the employer within the terms of the policy, and the employee is under a common law obligation to indemnify the company against any loss through acting as his surety. This is the position when the employee has filled up a proposal form and has in effect requested the insurance company to become surety, but the position may not be so clear when the guarantee is given without the knowledge of the person guaranteed. The right of recovery is nowadays seldom worth very much, and the position has therefore never been clarified by a legal decision.

The policy provides that the employer must give immediate notice of loss or of suspicion of loss. At this stage details and information as to the total loss are seldom available (except perhaps in such a rare case as where a pay clerk absconds with the weeks wages he is to pay), and the company issues a preliminary form of claim.

This form is on the following lines.

FIDELITY GUARANTEE PRELIMINARY CLAIM FORM

1. Name of Defaulter and last known address.	
2. State date of discovery of the irregularities and what led to it.	
3. For how long and in what manner have the embezzlements been carried on and concealed ?	
4. Has there been any previous irregularity in the Defaulter's accounts ? If so, state nature of same.	
5. What is the extent of the loss so far as at present ascertained ?	
6. Do you hold any other security than the above policy in respect of the Defaulter ?	
7. What salary, commission, or other remuneration or allowance is due to him.	
8. Has he to your knowledge any Property, Furniture or other effects ?	
9. Mention briefly to what circumstances you ascribe his downfall.	

DATE.....194.. INSURED'S SIGNATURE }.....

This is later followed by a final claim form which asks for particulars of the defalcation which will enable the company to check

the claim. This form is mainly comprised of a schedule on which such information is to be furnished and is on the following lines.

FIDELITY GUARANTEE CLAIM FORM

Person Guaranteed

I/We declare that the following statement is a true and correct account of the net amount of the defalcations of the above named, and of all amounts due to him.

Signature

Address

Date

Date amount received by defaulter	Date default discovered by Employer	Customer's Name	Customer's Address	Net Amount of Cash received by defaulter £	s.	d.
			£			
			Less (due to defaulter)			
			Salary .. £			
			Commission £			
			Expenses . £			
			£			

The date of notice is important as no acts of default committed after the discovery are recoverable.

On receipt of notice the first thing to do is to see the employer, and after obtaining what information is available, to get in touch with the defaulter. He may have absconded, in which case steps should be taken to trace him. The proposal papers will be of assistance in this connection as these contain references from intimate friends giving the address of the defaulter's father or other near relative, and it may be possible to ascertain something from this source.

When interviewed, the following information should be sought from the defaulter—

(1) If he admits the deficiency.
(2) What he estimates the total defalcations amount to.
(3) How long such defalcations have been going on.
(4) The method he employed.
(5) Whether he acted quite alone.
(6) What led him to commit the defalcation.

The defaulter should be urged in his own interest to assist the company so far as lies in his power. As a rule he will be only too willing to do so.

He may be in possession of some of the money misappropriated. In this case an endeavour should be made to prevail upon him to restore the balance to his employer or he may make some suggestion of repayment, but no promise or arrangement as to avoiding a prosecution can be made.

The possibility of all or part of the amount stolen being refunded is nowadays considerably less than it was formerly. In the author's early days the companies used to recover a considerable proportion of the amounts paid under fidelity guarantee policies, either in the way of lump sums or by periodical payments. This is still done but not to anything like the same extent.

The principal object of seeing the employee is to give him an opportunity of answering the allegation that he is a defaulter. He may be able to prove his innocence or he may be able to show he has not stolen so much as is alleged. As his character is at stake the company should be most careful not to proceed in any way until the employee has had an opportunity of admitting his guilt or proving his innocence, and it is desirable not to pay the claim until the employee has had an opportunity of agreeing that this is the amount which he has stolen. This, however, is not always possible; few defaulters have any exact idea of the extent of their defalcations and are usually genuinely surprised when they are told of the amount and very loth to believe it.

If the company holds a counter indemnity the person who has given this should at once be advised. He is entitled to the same early notice as the company, and subject to the terms of his indemnity he may be entitled to investigate and check the alleged defalcations.

Counter indemnities in commercial cases are now rarely met with. They were taken in sub-normal cases and often bolstered up cases which should have been declined. It was often very undesirable, especially when the employer was not informed and was allowed to employ a man whom he thought had "passed the Guarantee Company." The practice has now practically ceased.

When seeing the defaulter, no mention whatever of prosecution should be made, to avoid any possibility of compounding a felony.

To make any threat verbal or written that unless he refunds a prosecution will be instituted, or to promise not to prosecute if repayment is made, is to be guilty of compounding a felony which is a common law misdemeanour punishable by fine and imprisonment. It is an offence for any one to compound even though he suffer no injury by the default. The inspector, therefore, who makes the arrangement would be guilty. Some years ago an insurance official was prosecuted for this crime.

The prosecution clause (which gave the company the right to call upon the employer to prosecute before it paid the claim) is not found in the modern form of policy. The question of prosecution is not really one which concerns the insurance company, and should be left severely alone. The old argument that prosecution serves as a warning to others is of very doubtful validity.

The investigation necessary varies very much. In the case of a large public company the claim would probably be presented in such a form that all that would be necessary would be to draw the cheque in payment. Very possibly it would be certified by the company's auditors. In other cases it would be necessary to make an inspection of the books and to inspect vouchers. The company has the right to make a full investigation so as to satisfy itself as to the correctness of the claim, and a knowledge of book-keeping will prove of the greatest use to the claims inspector.

In many cases it will be found that there are false entries in the books, alterations, incorrect totals and amounts carried forward, incorrect postings and various manipulations that will render a correct computation of the defalcation a very difficult matter.

The duty of computing the amount stolen is on the employer, and very often it will be found to be an almost impossible task and may involve the opening and writing up of an entirely fresh set of accounts.

For instance, in the case of a traveller who is alleged to have received moneys for which he has not accounted, it may be necessary to see the receipts he has given, although it is generally possible to accept the employer's assurance that he has inspected them,

Travellers are generally given a counterfoil receipt book or a receipt book with interleaved sheets for carbon copies for the purpose of acknowledging the receipt of money, but is is surprising how frequently customers are content with a receipt on the invoice in spite of the warning that only a printed receipt will be recognized.

In the case of a cashier it may be that the defalcation has been made in connection with receipts or payments or perhaps both. A very frequent method is that of false entries in the wages book whereby wages have been drawn for a fictitious workman.

It is quite impossible to lay down any method of procedure; each case presents a different problem. The thing is to discover the *modus operandi* of the defaulter (he will probably disclose this if you are in touch with him; in fact many defaulters will produce or be prepared to compile a list of the thefts, though this is seldom complete—the one thing a defaulter is seldom able to do is to tell you of everything) and then to work carefully through all the items.

As it may be necessary to circularize all the customers asking for receipts to be sent for inspection, the investigation may take some time and the work must be thorough as only one payment is made. A claim once settled cannot be reopened, though if further deficiencies subsequently come to light the company would doubtless be prepared to deal with the matter on an *ex gratia* basis.

Some of the older forms of policy provide that the employer may be called upon to verify his claim by statutory declaration. This requirement is seldom found in present-day policies and less seldom enforced.

Mere deficiency unsupported by evidence of criminal misappropriation is not sufficient to support a charge of larceny or embezzlement, and neither is it sufficient to found a claim under the policy. It must be proved that the money has been stolen, and stolen by the person guaranteed. The company is not liable for loss due to muddled accountancy in the absence of proved misappropriation.

The company is only liable to contribute *pro rata* with any other guarantee whether by policy or otherwise held by the employer, and specific enquiry should be made to ascertain the position in this connection.

The theft may also be covered by a burglary or cash in transit policy, and contribution should be sought.

Many policies also cover stock as well as money, and the investigation of stock claims is often a difficult and laborious task.

There is another side to the matter, and that is to see that the misappropriation is within the period of the policy cover and that the agreed system of supervision as set out in the employer's form has been carried out. It may be some years since the employer's form was completed and in the meanwhile the employer has altered his system, possibly improving it. If there has been a reasonable endeavour to supervise the employee, it is not usual to penalize the employer when the agreed system has not been adhered to.

It may be found that the stated terms of remuneration have been altered. Instead of being paid by salary and expenses the employee may have been on commission only. He may have welcomed the change but trade depression or other cause has resulted in his not

earning a living wage, and this has been the cause of the trouble. It all depends upon the circumstances what line the company will take, but it is a *sine qua non* of successful fidelity guarantee underwriting that the person guaranteed shall have a sufficient regular income.

The inspector should also satisfy himself that the employer had no knowledge of previous irregular conduct or any suspicion thereof. The employer cannot be allowed to take a lenient view of such matters but must at once inform the insurance company.

If there is money due to the defaulter by the employer this must be credited in reduction of the claim. When the amount of the default exceeds the amount of the policy, it is usual to apportion the amount so due between the employer and the insurance company in accordance with their respective losses, but in the absence of stringent policy conditions it can be contended that in such circumstances the employer is entitled to the whole amount.

The receipt for the claim payment is usually taken on the policy in the case of an individual policy. If under a collective policy the name of the defaulter is deleted from the schedule. Where the claim arises under a floating policy the sum insured must be reinstated by the payment of an additional premium.

It is a fact well known to insurance men that defaulters who are subsequently called upon by a fresh employer to furnish a guarantee frequently suppress the fact that they have been previously guaranteed, and to counter this the companies make a practice of circulating the names of those in respect of whom they pay claims. This is colloquially known as the " Black List."

As regards claims under bonds given to local authorities the procedure is somewhat simpler as the bond provides that the company must accept a certificate (usually of the District Auditor, an official of the Ministry of Health) as evidence of the loss.

This official, who acts in a quasi-judicial capacity, is concerned not merely with the mathematical accuracy of the accounts of the authority which he audits, but with seeing that the expenditure of the money has been in accordance with the law and is properly vouched for. He has power to surcharge in respect of any illegal expenditure.

His audit is public, and interested parties may attend, and it is possible for the company to appear and show why the certificate should not be issued or issued for a particular amount. It can appeal to the Minister against the certificate in whole or in part. As a rule, however, there is very little to be gained by this as the District Auditor has usually gone most carefully into the matter.

It is nearly always the case that the defaulter, having stolen public money, is prosecuted and the possibility of recovery is nil.

When dealing with claims under Government and Court Bonds the procedure is again different.

Bonds given to Government departments are in the form of what is termed a money bond which provides that the insurance company is to pay on receipt of a certificate from the department. Some, as for example Customs Bonds, are penalty bonds and the amount of the bond could be claimed from the company; but in practice penalties are not enforced against insurance companies and the certificate is issued for the amount of the default. The issuing of the certificate is the only duty of the department, but in practice they are always ready to furnish information and in fact usually give the company immediate notice when they discover something wrong, the certificate being subsequently issued.

In the case of bonds given to the King's Bench and Chancery Divisions there is provision for the issue of a certificate. These guarantees are usually issued on behalf of professional men, generally chartered accountants, and defaults are very rare.

As regards lunacy bonds claims are not frequent and are not usually of large amount.

The order appointing the receiver provides that the stocks and shares of the patient shall be deposited at a bank subject to the Master's order, and the receiver has only the income of the patient to handle. This income has to be expended on the maintenance of the patient and any balance brought into court.

If the accounts of the mental hospital or home where the patient is confined are not paid, the matter speedily comes to light. The Department keeps a very vigilant eye on the affairs of the patients, and a receiver has but little opportunity of abusing his trust, but defaults do occur from time to time.

The bond provides that a claim shall be proved by the Master's certifying that a sum is due to the estate, and the receiver having made default in payment, the company is authorized to pay the amount to the official solicitor.

As a rule the company hears that things are going wrong before the actual certificate is issued. The renewal premium may not be paid and the formal intimation of non-renewal to the department may elicit the fact that things are not in order, or the Master may advise the company that accounts have not been filed in accordance with his order.

The first thing to do is to ascertain whether there has been a default in the full meaning of the term, viz., if money has been received and misappropriated by the receiver, or whether the trouble is that he has not filed his accounts.

In the first case the only thing to be done is to pay the amount as directed. The matter has been carefully investigated before the

Master's certificate is issued and it is not possible to check the amount, but particulars would doubtless be supplied if thought necessary. The next step is to get in touch with the receiver with a view to recovery. The company has a right to reimbursement quite apart from any indemnity agreement. These agreements are not now used in this class of business.

The other class of case is more frequent, where for some reason or other the filing of the accounts has been neglected, and in such cases it is often possible to put matters right and save any actual cash payment.

The receiver is usually a relative of the patient and the appointment is often held by a person who is unaccustomed to business. Such a person may have got matters into a muddle without any idea of stealing, and with the help of a claims inspector the tangle may very likely be sorted out and the account prepared. Sometimes it is a question of obstinacy; a receiver cannot see why he should do this or that, and foolishly takes up a stubborn attitude. This, though perhaps not an easy problem, is one that a claims inspector can solve.

It is quite impossible to lay down any hard and fast rule for dealing with such cases, but a patient and sympathetic claims man can often clear up matters to a very large extent, and in attempting to do this we can always count on the full support of the Master.

The claims that arise under administration bonds are not frequent, but they may be for a considerable amount and are invariably very troublesome.

The Principal Probate Registrar does not himself claim under the bond, but where it appears to the satisfaction of the Court that the condition of an administration bond has been broken (i.e. that the estate has not been administered according to law) he may, on application, order that the bond be assigned, and the person to whom the bond is assigned may sue thereon in his own name and recover as trustee for all persons interested the full amount recoverable in respect of the breach of the condition.

The application for assignment was formerly made in open Court, but the practice now is for the application to be made by summons before a Registrar and the order of assignment to be made by him.

Persons interested in the estate of a deceased person may call on the surety to the administration bond by summons supported by affidavit to show cause why, on a prima facie case being shown that the condition of such bond has been broken, an order should not be made that the same be assigned. The costs of the summons in the event of the order being made are usually allowed to follow the issue of the action.

The surety may resist the order by showing by affidavit that there has in fact been no breach of the condition of the bond or that there has been undue delay on the part of the applicant, and the Registrar has power to reject the application.

The surety may show that there has been a release or waiver of the breach of the condition on the part of the applicant or on the part of those under whom he claims.

The bond is annexed to the assignment and handed to the record-keeper, and the solicitor makes arrangement with him for the attendance of a clerk at the hearing of the action to produce the bond and assignment.

The liability under the bond is a wide one. It guarantees that the administrator shall duly administer according to law. The company accordingly is liable not only for his defalcations but also for his negligence and his mistakes. If the administrator does not administer according to law he must make good, and if he cannot do so then the company is liable.

The company is entitled to recover from the administrator and can seek protection against an administrator who proposes to distribute without providing for all possible claims.

The cases of actual defalcation are comparatively rare. The most frequent case is where errors in distribution have been made. They may be due to oversight on the part of the administrator or to something turning up of which he was not aware at the time he distributed the estate. Whatever the cause the result is the same. The person properly entitled claims on the administrator. If he can get the money back from the person who has wrongfully received it, all well and good but if not, and it is generally impossible to do so if several years have elapsed, the bond is put in suit and the surety has to make good.

These cases arise from various causes—sometimes the real facts have been suppressed when the proposal was submitted, as the parties did not want to bring the family skeleton out of the cupboard, but more often than not the disclosure comes as a complete surprise.

The most common are the cases where previous marriages come to light. There have been many cases where a young man has contracted a marriage abroad, possibly one that he repented of. On returning to this country years afterwards he has contracted a second marriage. Perhaps he had some grounds for believing that his first wife was dead or he may have had hopes that she will never be heard of. In some cases the first wife or a child of the marriage has turned up perhaps years after the man has died and his estate distributed.

The cases of persons who have lived together for years as man and wife without the marriage tie are numerous. Difficulties arise

when the estate of one party has been distributed on the basis that a valid marriage existed.

The cases where the parties to a marriage have separated and one of them, generally the husband, has gone abroad and disappeared are very common. Usually the facts are disclosed at the time the proposal is made and the matter can be arranged by means of a contingency policy. Sometimes the facts are not disclosed either through forgetfulness or because the parties had made up their minds that the individual was dead. Missing relatives or their descendants have a way of turning up even after many years, especially when they think there is money to be had.

The way a minor's share has been dealt with has sometimes given rise to claims. The amount has been handed over to a relative to hold for the minor. On his reaching twenty-one and claiming the money, it is not forthcoming, and a claim may arise in a case which has been considered closed for many years.

Cases where wills have subsequently come to light are within the experience of everyone. If everything is perfectly bona fide, the administrator is protected in respect of the administration which has taken place.

Another possible source of trouble is the making of a mistake in the administration. To settle who are the beneficiaries is sometimes a very difficult matter. That is one reason why it is essential to be satisfied as to the standing of the solicitor acting in the case when accepting a proposal.

It is quite impossible to lay down any line of procedure. Each case presents its own problems and may require a different line of approach. Probably all that can be said here is: Get the facts, see the administrator and hear what he has to say, and then place the whole matter before the company's solicitors for their advice.

CHAPTER VI

MOTOR CLAIMS

ON receipt of notification of an accident two questions immediately arise—

(1) Is the insured entitled to indemnity under the policy ?

(2) Is the insured liable to a third party for the accident ?

The first question should be thoroughly explored at the outset before any material step is taken. It may be too late to raise the question when the company is committed to any course of action.

It is possible that the second question can promptly be answered in the negative, e.g., it may be found that the insured's vehicle was not involved. As a rule, however, the question cannot be answered until the details have been carefully and thoroughly investigated. The first step is to issue a claim form which is generally similar to the example given on pages 96-7.

While every effort must be made to get this form returned promptly, where there are personal injuries investigation should not be postponed until it is received but should be commeced forthwith. Delay increases the work and may tend to the prejudice of the company. Where there is only damage to the respective vehicles, the matter is not of the same importance in view of the operation of claims agreements.

An enquiry letter should be sent to the witnesses or they should be seen and a statement taken from them.

The driver should be interviewed (if possible at the scene of the accident) and a written statement taken from him.

It is always better to interview witnesses and take statements from them rather than rely upon enquiry letters which may or may not bring a reply. If a letter is sent and after a sufficient time for a reply none is forthcoming, it will frequently be found, when a witness is called upon, that he has given a statement to the other side and declines to give another.

Nevertheless in times of pressure it is sometimes necessary to try and get statements by post.

As regards statements by the driver or a witness, some companies use a form which commences with spaces for the common facts such as name, address, occupation, date, time, etc., and then leaves space for the statement of the facts. This merely ensures that such relevant facts are not omitted, and it is on the whole preferable to use blank paper, taking care to see that these facts are embodied in the statement.

MOTOR VEHICLE ACCIDENT REPORT FORM

Name .. . . Occupation . . . .

Address ... . Telephone No.... . ...

PARTICULARS OF MOTOR VEHICLE CONCERNED

Make of Vehicle	Type of Body	Year of Make	Horse Power	Reg. Letter and No.	For what purpose was Vehicle being used

If you own more than one Motor Vehicle, how many were in use at the same time ? . . . .

Was a Trailer attached ? .. ..

If a Motor Cycle :— (1) Was a Sidecar attached ?
(2) Was a Pillion Rider carried ? . .

PARTICULARS OF ACCIDENT, LOSS OR DAMAGE

Name of Driver at time of Occurrence ....

Age .. .. Address of Driver . ...

Is Driver (*a*) Owner ; (*b*) Owner's Paid Driver or (*c*) Owner's Relative or Friend ? (*a*) . ... (*b*) . ... (*c*)..... .. ..

Date of Expiry of Driving Licence ... . Has the Driver ever been convicted of an offence in connection with the driving of a Motor Vehicle ? If so, give short particulars and date... .. ..

....

Has Driver previously been involved in an Accident ? ... ...

If Paid Driver, how long has he been in your employment ? . ...

Is there any other Policy indemnifying you or the Driver in respect of this Occurrence ? .. ..

Date of Accident ... . Time . . . . Place . . . .

If after lighting-up time, state whether your lamps were lit ... ...
Estimated Speed of your Vehicle .... Was horn sounded ? .....
If so, how many times ? ....

Give full description of how the Accident, Loss or Damage occurred :—

....

....

(Reverse of Motor Vehicle Accident Report Form)

WITNESS

Passengers in Vehicle ... .

Independent Witnesses .....

Did a Police Constable witness Occurrence or take particulars ? .. ..
Constable's No. . ... Was any statement, as to fault, made by Witnesses or Drivers at time ? .. ..

PARTICULARS IN RESPECT TO OTHER PARTY, OR OWNER OF PROPERTY, INVOLVED IN ACCIDENT

Name ....

Address ....

Full extent of Personal Injuries and/or Damage to Property . ...

Has Notice of any Claim been given to you ?. ....

Please despatch to the Company forthwith and unanswered any written communication which may have been received.

PARTICULARS OF INJURY TO OCCUPANTS OF INSURED VEHICLE

Was any Injury sustained by your Driver or Occupants of your Motor Vehicle ? If so, state fully extent thereof :—

....

....

PARTICULARS OF DAMAGE TO INSURED VEHICLE

Full Details of Damage ....
.... Estimated Cost of Repairs .. ..
Address where Damaged Vehicle may be seen.... ... .
Have you given any Instructions as to Repairs being started ? ....
In the event of Damage to Tyres, state :— Make ... .
Size..... Type ... . When Purchased .. . .
Mileage done..... ....

I/We hereby declare that, to the best of my/our knowledge and belief, the above statements are fully and truly made.

Date .... .19..... *Insured's Signature*..... ... .

SKETCH. Please make a rough Sketch of the road showing width of road or roads and position of Vehicles indicating how far Vehicles were from side of road. An Arrow should indicate the directions in which they were moving.

The following is the sort of form used—

INSURANCE COMPANY LIMITED

DEAR SIR,

Claim No. . . . .

We understand that you were a witness of an accident which occurred . . on the ... .

in which . . . .

and . .. .

.. . .

It would materially assist us in the completion of our enquiries if you would kindly answer the questions below, and return it as soon as possible in the enclosed stamped and addressed envelope.

Thanking you in anticipation.

Yours faithfully,

Accident Manager

(Reverse of Enquiry Letter)

Time of Accident . . . .

From what position did you witness it ? . . ..

How far were you away ? . . . . . .

Was the . . . . driver on his near side ?.... . .. .. .

At what pace was he travelling ? . . ..

How far from the kerb ? . . ..

Did the ... . driver sound his horn ? . . . .

If so, how many times ? . . . .

Whom do you consider was to blame and why ? . .. .

Describe how the accident was caused and illustrate by rough sketch below, if possible, setting out the positions of the various parties at the time of the accident.

Please give the names and addresses of any other persons who witnessed the accident.

Signature . . . .

Occupation .. . .

Date.. .. . .

Always let the driver or witness tell his story in his own words. Cross question as little as possible and then only to clarify points which may be in doubt. The skill of the investigator lies in extracting from the witness a simple and unvarnished statement of his evidence, and setting this out in the correct sequence of events. In short, what is wanted is a story from which the witness will not depart under rigorous cross-examination in Court.

When interrogating a witness one should imagine oneself to have been in the position of the witness, and try to picture what he saw or thought he saw.

If a witness is adverse, ascertain his evidence as meticulously as if he were favourable. It is quite as useful to know the adverse as the favourable evidence. Only by weighing one against the other may a true appraisement of the case be made.

The following specimen of a statement will suffice as a guide—

I George Smith of 299 Ash Road, Formby, Electrical Engineer, in the employ of the Lancashire Power Co. Ltd., was a witness of the accident which occurred in Southport on the 8th June, 1949.

At about 2.30 p.m. I was walking along Lord St. towards the monument from the station direction on the west pavement, i.e., the shore side.

The weather was fine and sunny and the roads dry.

I was unaccompanied.

When about 50 yards away from the junction of Lord St. with East Bank St. I noticed a bus emerging from the latter street and about to take the corner into Lord St. to proceed south.

When I noticed the bus first it was just on the turn with its front wheels just inside Lord St.

Its speed was not more than 10 miles an hour.

I had not heard any horn but the whole corner is not obstructed by buildings and there is full vision in all directions.

As soon as I saw the bus I heard the screech of brakes and saw a motor car coming down Lord Street from a northerly direction.

It was travelling fast when I first saw it. The front wheels were just about level with the pavement edge on the north side of East Bank Street.

The bus continued its turn keeping well into the kerb on its near side.

The car came on and the driver seemed to be doing all he could to stop.

I did not see the car swerve at all.

Just as the back of the bus cleared the corner the car hit it, the front nearside of the car coming in contact with the rear offside of the bus.

The car stopped immediately. Its nearside wheels were about 5 feet from the kerb.

The bus went on for about 5 yards and then drew up at the kerbside.

I went to the scene and gave my name to both drivers and to the Police who arrived there within a minute.

In my opinion the accident was due to the excessive speed of the private car.

I saw the Constable measure the width of the entrance to East Bank Street and it was 45 feet. This was paced out.

When the bus started to turn the corner therefore the car was at least that distance away.

Had the car driver been driving at a reasonable speed he would have had no difficulty in following on behind the bus in the normal way or passing the bus on the offside had he wished to do so. At the time there was no traffic coming from the opposite direction.

Witness ..... Signature .....
Address .....
Occupation.....

Statements should be read over to the driver or witnesses and care should be taken to ensure that they fully understand the contents. Any necessary amendment should be initialled by the driver or witness who should sign the statement, and it should be witnessed preferably by someone other than an official of the company.

When taking a statement from a driver it is well to embody certain particulars as to age, driving experience and the like. The following is a draft of a suitable preamble :—

I (full name) of (full address) am a (profession or occupation).
I am ... . .. years of age and have been driving motor vehicles for the past . .. . years.
My licence is clean (or I have been convicted for the offences of . . . . in ... .194 ..... and ... . in ... . 194 .. . . and my licence has been endorsed in respect of that offence or those offences).
I have no physical infirmity (or I have bad eyesight or suffer from deafness —state extent of disability).
On the.... . ... day of .... .194 ..... I was driving my motor car (wagon or cycle) Registered Letter and No. .... at (here set out in short paragraphs the full circumstances in which the accident occurred).

If the Police obtain any particulars of an accident they usually will furnish the names and addresses of witnesses and the parties implicated for a fee of 2s. 6d. If the accident was actually witnessed by a Police Officer or the Police have investigated the circumstances and taken any measurements, etc., an amplified report will be furnished for 10s.

The fees vary with the different Police Forces.

These fees are payable in advance and should be sent with the request for the report. If arising out of an accident and the Police intend to institute a prosecution, a report will not be furnished until after the charge has been heard.

A sketch of the scene of the accident with all traffic signs, positions of witnesses, tracks and final position of the vehicles, and any other relevant markings shown thereon, is of the greatest assistance when considering where liability lies. Such a sketch should be reasonably proportionate but not necessarily to scale. All material measurements should be shown. Tracks proved by independent measurements such as those embodied in a Police Report can be accepted. Apart from this all tracks marked (even on a plan which is otherwise to scale) should be accepted according to the quality of the available evidence.

The following points should be borne in mind—

(1) Draw to approximate scale and mark scale.
(2) Be very exact about width of road.
(3) Note all signs, crossings, etc.

(4) Note houses, walls, fences, etc., which might obstruct vision.

(5) Note gradient.

(6) Note traffic lines if road is so marked.

(7) Mention surface and condition of road.

(8) Mention lighting, marking lamp posts.

(9) Amount and class of traffic.

In fact, what is wanted is what is called in the Fire Department a plan and report.

Photographs of the scene of the accident, in conjunction with a good sketch plan, are of the greatest help.

Snapshots by an amateur may suffice, but if the claim is likely to be serious and result in legal proceedings it may be necessary to produce proper photographs at the trial. In such a case it may be desirable to employ a professional photographer. Photographers accustomed to press work generally know exactly what is required. All negatives must be preserved until the claim is settled, but only one or two sets of prints need be prepared initially.

Photographs should be taken from various points, the position of which and any other material details being stated on the back of the print. The points from which the photographs were taken should also be shown on the sketch or on a key plan.

If there is any variable feature, such as foliage or the possibility of any road alteration being made (e.g., the occurrence of an accident might lead to the rounding off of a corner, or the removal of some obstruction to view, before the case can be heard) then it is desirable that a photographic record should be obtained as soon after the accident as possible.

The Police, as part of their investigations, frequently have excellent sets of photographs prepared. It is sometimes possible to obtain a set of these, but not until after any police court proceedings have taken place.

Photographs and plans cannot be produced in Court and used in evidence unless they have been previously agreed by both sides or if not agreed are proved by the person who actually took the photographs or made the plan.

A note should be made of the driver's age, his driving experience, whether there are Police prosecutions for previous driving offences, and the length of service with the insured. This information, which will be disclosed on the claim form, should be checked with the proposal. It may have a bearing on deciding as to liability for the accident.

The rule of the road in England is that traffic using the road keeps to the left. There are, however, various exceptions and the

overriding rule is that the user of the road shall drive with due regard to the safety of other users.

The exceptions are—

(1) Emergency or " Agony " Rule (avoiding a head-on collision by deviating from the proper side).

(2) Tramways.

(3) Led horses.

(4) Stopping place on wrong side.

(5) Special track in street.

(6) Departure from the rule by agreement.

The rule of the road has not received statutory sanction but arises from custom, and it is generally recognized that it must be observed.

Payment for emergency treatment must be made immediately if cover is in order, irrespective of liability.

The payment of hospital expenses under the Road Traffic Act is contingent upon a payment being made to the third party.

Certain kinds of damage caused give rise to claims which cannot be contested.

Under the Telegraph Act, 1878, claims made by the Postmaster General for damage done to any telegraph line have to be met irrespective of negligence.

By the Gas Works (Clauses) Act, 1847, Gas Authorities are entitled to recover up to £5 for damage to standards and fittings without regard to the question of negligence. If the damage exceeds this figure, the first £5 is recoverable summarily but the balance only on proof of negligence.

The Electric Lighting (Clauses) Act, 1899, contains similar provisions in relation to electric light standards and fittings.

Damage caused by sparks from a traction engine or steam wagon passing along a public highway gives rise to an absolute liability on the part of the vehicle owner.

The name of the company insuring any other vehicle concerned in the accident should be ascertained at the first possible moment, and advice sent it in accordance with the claims-sharing agreement in force.

Claims for damage to immobile property frequently come within a claims agreement. Even if there is no agreement these claims, which are frequently from fire departments, are usually settled amicably.

The motor policy extends to indemnify drivers other than the insured against third party liability. Where, under a private motor-car policy, the claim form shows that some person other than the insured or his chauffeur was driving or the insured was driving a vehicle not belonging to him, particular notice should be paid to the question on the claim form relating to other indemnity.

Should a third party claim be involved and it be found that other indemnity was existing, a communication should be addressed to the other insurer.

The matter may very well fall to be dealt with under the third party claims (dual indemnity) clause of the knock-for-knock agreement.

One of the problems that is constantly arising is the no claims bonus. Whatever is to be said for the merits and demerits of the system, it has come to stay.

This bonus is not allowable when a payment has been made under the policy unless it can be demonstrated beyond reasonable doubt that such payment was made solely on account of an inter-office agreement.

The common plea of the insured that he should be allowed the bonus because the accident was not his fault should be stoutly resisted. It is not a " no blame " bonus. If it were, the company could reasonably be expected to make the allowance from the premium for a new policy after paying a total loss claim for fire or theft provided the insured demonstrated that he had taken reasonable precautions to safeguard his vehicle from such loss.

The test to be applied in considering bonus applications is as to whether, in the absence of a policy, the insured would have had any difficulty in recovering the amount of his damage without expense to himself, and the application of this test rules out the admissibility of a bonus in the case of most traffic accidents. It also disposes of all applications where damage is caused by unknown persons, even although the vehicle may have been parked.

A number of these applications are made at the time the claim form is completed, and may be disposed of then with less difficulty than is the case if the insured is advised that the matter will be considered after all enquiries are completed. It is not difficult in a large number of cases to apply the test mentioned above on the information supplied by the insured. He is then more amenable to the suggestion that his application is unreasonable than is the case after the claim has been settled.

It is essential to make sure if the insured has any right of recovery (other than that provided by the policy) in respect of the damage sustained ; if he has, steps should be taken to safeguard the company's right of subrogation.

Many policies are subject to an excess. When the excess applies to own damage only, the usual procedure is to instruct the repairer by letter to send an account for the excess direct to the insured and the account for the balance to the company, the insured being advised accordingly.

In cases where the excess applies to all sections it should be applied in priority to own damage and the foregoing procedure followed.

If the cost of the repairs is less than the excess then the balance is available for third party claims. In this event the insured should be informed of the position, and whenever possible payment of the balance of the excess should be obtained before the claim is settled. This applies equally when there is an excess on a third party policy. Excesses are not applied to charges for emergency treatment.

It may be necessary to provide for the defence of the insured and/or his driver in a Police Court. The usual fee paid to a solicitor of good standing and experience in this class of work is £3 3s. If it is necessary to arrange for legal representation of the insured and/or his driver at an inquest the usual fee is £3 3s. unless there are exceptional circumstances such as length of time engaged.

A copy of the depositions may be obtained where necessary from the Coroner on payment of a fee based on the number of folios, but this expense need be incurred only in exceptional cases, the solicitor's report usually providing all the information necessary as to the evidence tendered at the inquest.

Should any undesirable feature come to light during the handling of a claim (this is particularly important near renewal date), e.g., bad driving record, excessive number of accidents, defect in or inadequate maintenance of the insured vehicle, youthful, aged or physically defective drivers, police prosecutions and so on, the risk should immediately be brought to the notice of the underwriting department for review and the invitation to renew, if renewal has been invited, withdrawn if necessary.

When a claim is received for loss of or damage to a car (even as the result of fire or frost) or loss of spare parts, accessories, rugs, coats or luggage (when this risk is covered) which occurred on licensed or hotel premises, the possible liability of an innkeeper should be kept prominently in mind.

An innkeeper's liability was modified by the Innkeepers' Liability Act, 1863.

At common law an innkeeper is liable for loss of or injury to the property of his guests except those arising from the Act of God, the King's enemies or the fault of the guest or his servants or agents. Sect. 1 of the Innkeepers' Liability Act, 1863, limits the innkeeper's liability to make good any loss or injury to goods or property brought to his inn (not being a horse or other live animal or any gear appertaining thereto or any carriage) to an amount not greater than £30 except—

(*a*) where the goods are stolen, lost or injured through the wilful act, default or neglect of the innkeeper or any servant in his employ; or

(*b*) where the goods or property are deposited with the innkeeper expressly for safe custody, in which case he may demand that the goods or property shall be placed in a sealed box or other receptacle.

In order to obtain the benefit of the foregoing provisions, the innkeeper must exhibit in a conspicuous part of the hall or entrance of his inn a copy of Sect. 1 of the Innkeepers' Liability Act, 1863.

The term "carriage" includes motor-car and "premises" includes any place allocated by the innkeeper for the parking of cars (*Aria* v. *Bridge House Hotel* (*Staines*) *Ltd.* (1927), 137 L.T. 299).

In *Winkworth* v. *Raven*; [1931] 1 K.B. 632, it was decided that whilst an innkeeper was in effect an insurer of his guests' goods, including motor cars, against theft he was not liable for damage done to such goods without negligence on his part or on the part of his servants. This was a case of frost damage, but it may be assumed that it would be followed in the event of damage by accidental fire.

There are two cases of limitation which must be kept in mind. Proceedings for recovery of damages from a public authority in England must be commenced within twelve months from the date of the accident (Public Authorities Protection Act, 1893, as amended by the Limitation Act, 1939).

Proceedings under the Fatal Accidents Acts, 1846 to 1908, must be commenced within twelve months from the date of the accident.

It is usually better to complete the settlement with a third party direct. The practice of instructing repairers and obtaining a satisfaction note from the third party should be avoided except in very special cases.

It is, however, customary to arrange for the repair of damage to the insured's own car, and before paying the repairer's account it is usual to obtain a satisfaction note on the lines of the following—

The——Insurance Co. Ltd.,

Dear Sirs,

Motor Claim No.

This is to certify that the repairs authorized have been carried out to my satisfaction, and the repairer's account therefore may be discharged.

Signed.....

Address .....

.....

In the event of a claim for theft of the car, it is essential that notice should immediately be given by the insured to the Police. The Police should be interviewed and the closest co-operation with them should be maintained. No charge should be made against any person except under legal advice, and no undertaking to prosecute should be given to the Police. Before advertisements and offers of reward are agreed, legal advice should be taken.

If the property can be traced even to an innocent purchaser, it can be recovered. Property in stolen goods will pass only in market overt, and a motor car dealer's premises would not be market overt.

When stolen goods are sold in a market to which the privilege of market overt attaches, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of want of title on the part of the seller. Nevertheless, under the Larceny Act, 1861, if the owner prosecutes the thief to conviction the property in the goods reverts to the original owner notwithstanding any immediate dealing with them whether by sale in market overt or otherwise.

Every care should be taken to see that rights of recovery are not overlooked. This recovery may be in the form of—

(1) Excess borne by the insured.
(2) Contribution by another company.
(3) Responsbility of third party.
(4) Subrogation of contractual rights of insured.

There is no statutory right to medical examination as was given by the Workmen's Compensation Act. The injured party, therefore, has the right to have his medical attendant present, and the company must pay his reasonable fee. If it can be arranged that this fee shall be costs in the action and therefore depend upon the result, so much the better.

When dealing with a claim made by a married woman, the following points should be borne in mind—

At common law neither husband nor wife can sue the other for a tort committed during marriage. The rule still remains absolute in the case of the husband, but by Sect. 12 of the Married Women's Property Act, 1882 (amended by the Law Reform (Married Women and Tortfeasors) Act, 1935) it is provided that a wife " shall have in her own name against all persons whatsoever, including her husband the same civil remedies . . . for the protection and security of her own property as if such property belonged to her as a feme-sole but except as aforesaid no husband or wife shall be entitled to sue the other for tort."

It is not generally advisable to arrange negotiated settlements in these cases ; they are better brought into court.

Only if a wife is acting as the servant or agent of her husband can he be held responsible for her torts.

In every case where a payment is made by an authorized insurer in accordance with the provisions of the Road Traffic Act, 1930 (Sect. 36 (2)) and Road and Rail Traffic Act, 1933 (Sect. 33), in respect of injuries or death, and the person who has died or been bodily injured has to the knowledge of such insurer or the owner of the vehicle received treatment in a hospital, the insurer must pay to the hospital the reasonable cost of the treatment afforded. The maximum amount payable is £55. (In-patient treatment, £50; Out-patient treatment £5.)

Daily rates for in-patient treatment vary from year to year. The position *vis-a-vis* the new Regional Hospital Boards is yet to be considered.

For out-patient treatment the following scale is fairly generally adopted—

First attendance (including dressing, splints, etc.)	5s.
Subsequent attendances (including simple dressings and inspection)	2s.
X-ray examination (per examination)	10s. 6d.
Electrical treatment (per attendance)	2s.
Massage treatment (per attendance)	2s.

For emergency treatment, where immediate medical or surgical treatment is required by the victim of a road accident, the user of the mechanically propelled vehicle involved is liable to pay the doctor giving such treatment a fee of 12s 6d. in respect of each person treated, plus 6d. for every mile in excess of two covered by the doctor from the place where he was summoned and his return thereto. When emergency treatment is rendered by a hospital the 12s. 6d. is paid to the hospital and credited towards the total hospital expenses (Road Traffic Act, 1934, Sect. 16 (1) (2)).

Fees for emergency treatment are paid by the company as a benefit under the policy. When emergency treatment is in respect of injuries to passengers, the fee or fees are paid by the insurer of the driver of the vehicle in which the passenger was travelling.

Payment of emergency treatment charge only does not affect allowance of the no claim bonus, and is not taken into account in adjustment of excess.

In dealing with claims for personal accident benefits the practice of the personal accident department should be followed. In fatal cases it is necessary to request production of death certificate and probate or letters of administration.

In the case of damage to vehicle claims, it is necessary to arrange for inspection of the damage at the earliest possible moment by the

company's motor engineer or an independent engineer. In cases where the accident has been caused by a failure or breakage in the car, the motor engineer should be asked to give this point particular attention.

When parts are difficult to obtain, it is sometimes possible for the car to be made usable, and the parts can then be fitted when they arrive. It is, however, important to ensure that no liability is accepted for temporary repairs. The item for loss of use may be the most serious one in the third party claim.

In own damage claims it is desirable to obtain competitive estimates for the repairs when this is possible.

Frost damage if covered is covered only on the understanding that the insured shall have taken proper precautions. Unless these have been taken liability should be denied.

An agreement has been entered into by the companies with the Minister of Transport whereby as from the 1st July, 1946, the Motor Insurers' Bureau deals with the claims against motorists who are uninsured or who cannot be traced or who are unable to satisfy a judgment against them in full. The student is advised to make himself acquainted with the terms of this agreement, a copy of which can be obtained from H.M. Stationery Office, price one penny.

CHAPTER VII

THIRD PARTY CLAIMS

THE risks covered by third party policies are extremely diverse in character, varying from the whole of the activities of a municipality to those of builders, music halls, football clubs, processions through the streets, restaurants, sale shops, hospitals, doctors, chemists, churches, farmers, schools, bazaars and so on in infinite variety.

The policies usually cover the insured's liability for bodily injury to and damage to the property of persons not in his service, caused through the insured's negligence or that of his servants or through any defect in his plant or machinery up to the limit of the policy. Persons in the service of the insured are excluded. They were formerly covered by a workmen's compensation policy.

The policy is limited to the insured's common law liability for negligence and nuisance. It does not cover any liability which he may have assumed under an agreement. For instance, a tradesman may undertake to carry out certain work and to relieve his principal of liability for any accident which may arise out of the work. If he has made such an agreement and has not disclosed it and arranged for cover accordingly, then in the event of a claim arising the ordinary third party policy will not cover the liability which has been voluntarily accepted under the agreement and which may not rest on him apart from such agreement.

On receipt of notification of a claim under a third party policy a claim form should be issued and its completion secured with promptitude. A specimen of the form in use is given on page 110.

The principal point to be considered is whether the policy covers the risk and whether there has been negligence rendering the insured liable.

When the claim form is returned it is necessary to check—

(1) That the notice has been given timeously.

(2) That the business out of which and the place where the accident arose are covered by the policy.

(3) That the person claiming is not in the employ of the insured or a member of his family.

(4) That the property damaged was not in the custody or under the control of the insured or his servants.

Property upon which the insured or his servants have been operating, as for instance the glass which a glazier is replacing in a

THIRD PARTY (GENERAL) CLAIM FORM

This form should be completed and returned to the Company **immediately** *whether a claim has been made on the Insured or not.*

1. Name of Insured .. .. Address .. .. .. Business	
2. Date, hour and place of accident	
3. Cause (*full information*) ..	
4. Nature and extent of injury or damage	
5. (*a*) Name, address and age of injured person .. .. (*b*) Name and address of owner of property damaged .. .. .. (*c*) Is he or she in your service ?	
6. Has any communication, verbal or written, been made to you by or on behalf of any injured person or owner of property damaged ? If so, give particulars. (*Any written communications received must accompany this form*).	
7. Have any steps been taken to compromise or settle the matter in any way ? If so, what, and by whom ? ..	
8. When, and by whom was the accident reported to you ?	
9. Names and addresses of witnesses of accident ..	
10. Give the number of the policeman, if any, who took particulars	

I/We hereby declare that to the best of my/our knowledge and belief, the above statements are fully and truly made.

Date... .. .. .19 .. .... Insured's Signature . .. .

window, would not be covered by the glazier's own third party policy.

(5) That the claim is made at common law and not under contract.

(6) That the accident is not due to a horse-drawn vehicle, motor-car, lift, boiler or to any cause excluded by the third party policy and usually covered by a separate policy of insurance.

(7) That it does not arise from goods which have been sold unless this liability is specially insured.

(8) That in the case of builders and contractors the claim is not in respect of damage to the building on which they are engaged or to the foundations or walls of an adjacent building.

(9) That the damage (if to property) has not been caused by fire or explosion unless specially insured.

The procedure of investigation will, of course, vary considerably in different cases. The following general points arise—

(1) Has the accident arisen out of something the insured or his employees have done or ought to have done?

(2) Was anyone else acting jointly with the insured at the time, as in the case of unloading operations, and if so is the other party liable? There may have been joint negligence by both parties, in which event both will be liable (joint tortfeasors).

(3) The relationship of the insured and his employees to the person injured or the owner of the property damaged. Did they owe a duty to that person and was he entitled to be there at the time?

(4) Was the person injured negligent in any way or had he failed to do something which he ought to have done, and was his negligence or failure the cause of the accident?

(5) Was the insured using machinery or plant belonging to someone else—for example, a crane, a defect in which may have caused the accident and if so is he or the owner of the crane liable?

(6) Is there any right of indemnity against another party as in the case of the sale of proprietary foods, drugs, furs, etc.?

By Sect. 14 of the Sale of Goods Act, 1893, where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

If the insured is called upon to make any payment in connection with an article sold by him, he may be entitled to claim an indemnity from the person who supplied him with the goods and he in turn may be able to claim against the person from whom he bought the articles. It is therefore necessary when such a claim arises that notice thereof should be given at once to the wholesaler or other retailer, as the case may be, who should be requested to take over the conduct of the claim made against the insured.

In any case, no settlement should be made with the claimant without the approval and consent of the next party in the chain who is to be held liable. The foregoing assumes, of course, that the policy has been extended to cover claims arising from goods sold or supplied.

(7) It should not be overlooked that agreements with other companies apply to the adjustment of claims involving two or more parties. Where this possibility exists, the names of the other companies should be ascertained and reference made to office records to see whether the basis of apportioning the cost of the claim is laid down.

(8) It is necessary to know precisely how the accident occurred and what damage has been caused. If personal injuries have been caused, what medical and other out-of-pocket expenses (special damages) have been incurred and what amount is claimed for pain and suffering and injured feelings (general damages)?

(9) If the accident is due to the breakage of a machine, chain or the like, the broken parts should be carefully preserved until they have been examined and the claim has been disposed of.

If there are any statutory obligations as to the use and testing of chains, cranes, etc., whether they have been complied with.

(10) The insured should be told to avoid altering the machine or place where the accident occurred in order that no suggestion may be made that these alterations should have been effected before the accident.

(11) A photograph or sketch of the scene of the accident, if likely to be useful, should be obtained.

(12) If it is desirable, a report by a qualified expert (e.g., an engineer, an analyst, a builder, etc.) should be procured.

(13) A valuation of the property damage done should be made by a qualified expert, and in the case of personal injury an early medical examination should be arranged for.

(14) It should be ascertained whether the insured or his employee has made any statement at the time of the accident which may be

regarded as an admission of fault or liability or as a promise to repair damage which may have been done.

If an admission of liability or promise to repair has been made it is important to know this in order to decide whether the claim can be dealt with under the policy. Even if the liability is clear the admission may create difficulties in negotiating a settlement, in which case it may be fair that some part of the cost should be borne by the insured. If there is clearly no liability then the claim should be rejected and the insured left to dispose of the liability he has created by his promise.

(15) Written statements duly signed and witnessed should be obtained from witnesses.

(16) In the case of fatalities it is usually desirable to arrange for the insured to be legally represented at the inquest.

It will probably help in indicating a direction in which the enquiries might take to bear in mind some of the defences available to the insured, viz.

(*a*) that every reasonable precaution was taken;

(*b*) that the defect (if any) was well known to the injured person and that he voluntarily accepted the risk;

(*c*) that the accident was caused by a latent defect which could not have been discovered by ordinary examination;

(*d*) that the injured person disregarded a notice of warning;

(*e*) that the defect was in a portion of the premises to which the injured person had no right of access. The duties imposed upon an individual vary according to his relationship to the person injured. An invitee is entitled to a higher measure of care and protection than a licensee, and a licensee is entitled to greater care and protection than a trespasser;

(*f*) that the accident was attributable to the unauthorized act of a stranger;

(*g*) that there was contributory negligence on the part of the claimant in not exercising reasonable care to avoid the accident. This is, however, no longer a complete answer to the claim.

Although in ordinary circumstances a claimant is required to prove that the insured has been negligent, the onus of proof is readily shifted if the accident was caused by something which should normally not have happened, such as the breaking of tackle.

If something of this kind occurs then the thing is said to speak for itself, and negligence will be imputed to the insured unless he can show that it occurred through some cause over which he had no control, such as latent defect in gear which had not disclosed itself although reasonable examinations and tests had been made periodically.

By the Limitation Act, 1939 (Sect. 21), a public authority is exempt from liability if the claimant fails to commence his action within twelve months after the accident. This replaces the six months' period of the Public Authorities Protection Act, 1893, which is the period still applying to Scotland and Northern Ireland.

In case of accidents alleged to arise out of defects in the highway, no action will lie against a public authority if the accident was due merely to non-repair of the roadway as distinct from one due to defective repair. In other words, if a road through want of repair becomes dangerous and causes an accident, this is nonfeasance and the public authority is not liable even though they are responsible for the upkeep of the road. But if repairs having been undertaken, and an accident arises through the inadequate performance of the work, this is misfeasance and liability would arise. In Scotland there is no such distinction, and a public authority is liable for both nonfeasance and misfeasance.

Should the policy contain a monetary limit there is always the possibility that the amount of the claim may exceed the sum insured in which case it may be deemed advisable to pay the insured the amount of the limit plus any costs incurred to date and leave him to dispose of the claim.

CHAPTER VIII

PERSONAL ACCIDENT CLAIMS

THERE is perhaps no business in which generous and sympathetic treatment of claims is so essential as in this. The insured, the claimant and the injured person are one and the same person, and a man who has received an injury from the effects of which he is still suffering is not usually in a mood to appreciate anything in the way of quibbling. In view of this personal aspect the claims require very careful and tactful handling.

A certain amount of elementary medical knowledge is useful, but it would be beyond the scope of this book and the capacity of the author to deal with this aspect of the matter.

The claims are handled by the companies, the services of independent loss assessors not being utilized.

On receipt of notice of accident or illness a claim form is issued. This form is usually divided into two parts—one to be filled up by the insured (or by someone on his behalf if he is suffering from an infectious disease) and the other by the medical man in attendance.

Specimens of such forms are given on pages 116-9.

The medical part of the form is filled up at the insured's expense.

When the form is returned it is necessary to see—

(1) If the injury has been sustained by accidental, violent, external, and visible means, and is covered by the policy, and that none of the exclusions apply.

(2) If, in the case of an illness claim, the illness was contracted prior to or within four weeks of the inception of the insurance.

(3) If the illness certified by the doctor is identical with one of those covered by the specified illnesses in the policy and is the sole cause of the disability.

(4) If there has been any change in the risk, as for example the engaging in an occupation carrying a higher rate, or there is some additional hazard of which the company had not been advised.

(5) If the insured's age and weight as shown on the claim form agree with the particulars on the proposal form or previous claim form.

(6) If the insured has obtained and acted upon proper medical advice as required by the policy conditions.

(7) If the answers of the doctor in the medical report indicate that there is anything in the past history of the insured which was not disclosed when the policy was taken out or prior to renewal and

PERSONAL ACCIDENT CLAIM FORM

This form is issued without admission of liability, and must be completed and returned within seven days after its receipt. No claim can be admitted unless a medical certificate overleaf be furnished at the expense of the Claimant.

1. Name in full Residence Business Address Present Business or Occupation *If more than one, state all*	Present Age, years. Height, ft in. Weight. st. lbs.
2. (*a*) When did accident occur? State day, date, and hour (*b*) Where did it occur? (*c*) Give full particulars of the cause, and the injuries sustained	
3. Give names and addresses of any Witnesses of the accident	
4. (*a*) Give name and address of the Doctor who attended you (*b*) Name and address of your ordinary Medical Attendant	
5. State where and when a Medical or other Officer of the Company can visit you, if necessary	

	To Bed.	To Room.	To House.
6. (*a*) State the number of days you have been necessarily and entirely confined to Bed, Room or House, as the *sole and direct* result of the injuries sustained	for days from to (*Both inclusive*)	for days from to (*Both inclusive*)	for days from to (*Both inclusive*)
(*b*) If still confined to any, state which	(*b*)		
(*c*) Have you in any way attended to business or work during the above period?	(*c*)		
7. Have you previously claimed or received compensation under an Accident and/or Sickness Policy? If so, please give particulars			
8. (*a*) Are you insured elsewhere? (*b*) If so, give the name of each Company or Insurer, and amount you are entitled to claim	(*a*) (*b*)		

I HEREBY DECLARE that I have received the injuries above described, and warrant the truth of the foregoing particulars in every respect, and I agree that if I have made, or if I shall make, any false or untrue statement, suppression or concealment, my right to compensation shall be absolutely forfeited.

I claim to be paid the sum of per week, or the total sum of which I agree to accept in full settlement of my claim on the Company.

Date 19 *Signature*

(Reverse of Personal Accident Claim Form).

PRIVATE AND CONFIDENTIAL

NOTE.—This form to be completed by the Claimant's Medical Attendant whose replies should be as full as possible.

1. CLAIMANT—Name in full			
2. The nature and extent of injuries .. .. .. (*If to a limb, state whether right or left*).			
3. The cause of the accident, so far as known to you .			
4. (*a*) Date of your first attendance upon him in consequence of the injuries sustained	(*a*)		
(*b*) Are you still in attendance? . ..	(*b*)		
5. Are you his usual Medical Attendant, and, if so, how long have you known him, and for what have you attended him?			
6. (*a*) Are his symptons (i) due exclusively to the accident, or (ii) traceable to disease, infirmity or any other cause? ..	(*i*)	(*ii*)	
(*b*) Has he ever suffered from Gout, Rheumatism, Diabetes or Fits?	(*b*)		
(*c*) Is there anything in his medical history which may have contributed, directly or indirectly, to the accident, or which may be likely to retard his recovery? . ..	(*c*)		
(*d*) Have you any reason to suppose that he was under the influence of intoxicants at the time of the accident? .	(*d*)		
7. State the time, within your own knowledge, that the Claimant has been, as the direct and sole consequence of the injuries sustained, necessarily confined to his bed, room, or house .. If still so confined, state to which; and the probable duration of confinement to each	TO BED.	TO ROOM.	TO HOUSE.
	from to (*Both inclusive*)	from to (*Both inclusive*)	from to (*Both inclusive*)
8. (*a*) Has he been able to attend to any portion of his business or occupation? (*b*) If so, from what date?	(*a*)	(*b*)	
(*c*) If not, please state probable date (i) of his being so able (ii) of his complete recovery .. .	(i) (ii)		
9. Is there now any disability? If not, please give date of recovery			
10. Any further remarks ..			

I hereby certify that the above-named met with the accident referred to, and that the foregoing statements are correct.

Signature . . . . . *Qualifications* . . . .

Address . . . . . *Date* . . . 19 ....

TOTAL DISABLEMENT occurs when the Insured is wholly prevented from attending to his business or occupation.

PARTIAL DISABLEMENT when prevented from attending to a substantial portion thereof.

ILLNESS CLAIM FORM

This form is issued without admission of liability, and must be completed and returned within seven days after its receipt. No claim can be admitted unless the MEDICAL CERTIFICATE OVERLEAF be furnished at the expense of the Claimant.

1. Name in full Residence Business Address Present Business or Occupation *If more than one, state all.*			Present Age, years. Height, ft in. Weight. st. lbs.
2. (*a*) Nature of illness (*b*) When did it commence?			
3. Name and address of the Medical man whom you first consulted			
4. Name and address of your usual Medical Attendant			
5. Have you ever suffered before from the illness in respect of which you are claiming?			
6. State where and when a medical or other officer of the Company can visit you, if necessary			
	To Bed.	To Room.	To House.
7. (1) State the number of days you have been necessarily and entirely confined to Bed, Room, or House, as the *sole and direct* result of your illness	for days from 19 to 19 (*Both inclusive*)	for days from 19 to 19 (*Both inclusive*)	for days from 19 to 19 (*Both inclusive*)
(2) If still confined to any, state which	(2)		
(3) Have you in any way attended to business or work during the above period?	(3)		
8. Have you previously claimed or received compensation under an Accident and/or Sickness Policy? If so, please give particulars			
9. (*a*) Are you insured elsewhere? (*b*) If so, give the name of each Company or Insurer, and amount you are entitled to claim	(*a*)	(*b*)	

I HEREBY DECLARE that I am suffering or have suffered from the illness above-named, and warrant the truth of the foregoing particulars in every respect and I agree that if I have made, or if I shall make, any false or untrue statement, suppression or concealment, my right to compensation shall be absolutely forfeited.

I claim to be paid the sum of . . . . per week, or the total sum of . . . . which I agree to accept in full settlement of my claim on the Company.

Date . . . . . 19 . . *Signature* . . . . . .

N.B.—In the case of Infectious Disease this form should not be touched by the Patient.

(Reverse of Illness Claim Form).

PRIVATE AND CONFIDENTIAL. MEDICAL REPORT.

NOTE.—This form to be completed by the Claimant's Medical Attendant whose replies should be as full as possible.

1. Claimant's name in full ..	
2. Please state the exact nature of the complaint and the region affected	
3. How, in your opinion, was the complaint contracted?	
4. For what length of time has he in your opinion been suffering from the complaint?	
5. (*a*) Give the date of your first attendance, (*b*) Are you still in attendance?	(*a*) (*b*)
6. Have you on any previous occasion attended him for a similar complaint to that from which he now suffers? If so, when and for how long?	
7. Is he suffering from any other complaint? If so, state the nature thereof and to what extent his recovery may be affected thereby	
8. (*a*) Are you his usual Medical Attendant? ..	(*a*)
(*b*) If so, how long have you known him, and for what complaints have you attended him?	(*b*)
(*c*) Are you aware of anything in his medical history which may have contributed directly or indirectly to his present complaint or which may retard his recovery in any way?	(*c*)

	To Bed.	To Room.	To House.
9. State the time, within your own knowledge, that the Claimant has been, as the direct and sole consequence of the illness sustained, necessarily confined to his bed, room or house	from to . (*Both inclusive*)	from . to . (*Both inclusive*)	from .. - - - to ... (*Both inclusive*)
If still so confined, state to which, and the probable duration of confinement to each	. .. .	.	.. ..

10. (*a*) Has he been able to attend to any portion of his business or occupation? (*b*) If so, from what date? ..	(*a*) (*b*)
(*c*) If not, please state probable date (i) of his being so able	(i)
(ii) of his complete recovery	(ii)
11. If the case is a notifiable one, has it been reported to the Medical Officer of Health?	
12. Any further remarks ..	

I hereby certify that the above-named is suffering from the illness referred to, and that the foregoing statements are correct.

Signature .. *Qualifications* .. .

Address *Date* 19 . ...

which, had the company known it, would have influenced its attitude towards acceptance or renewal. A misrepresentation or omission to state material facts renders the policy voidable.

(8) If there is anything to suggest that the insured has been under the influence of intoxicants. In the case of an insured who is receiving the total abstainers abatement, this is of importance whether the evidence is of intoxication at the time of the accident or at any other time for which the abatement has been claimed.

(9) If any other personal accident policy of which the company had no knowledge is in force.

It is necessary to ascertain whether the insured has been (*a*) totally disabled, or (*b*) partially disabled, in accordance with the definitions of these terms in the policy, regard being had to the following points—

(i) *Accidents* (*Limit* 52 *weeks*). Total disability occurs when the injury solely and directly disables and prevents the insured from attending to his business or occupation as described in the policy. Hence it follows that an insured who is described as master, working and superintending, and who is disabled for manual work but not for superintending, must be regarded as partially disabled only.

Partial disability is defined in the policy as disablement which solely and partially disables an insured and prevents him from attending to a substantial portion of his business or occupation. Inconvenience does not constitute partial disablement.

(ii) *Illness under specified illness policy.* Total disability benefits (limit 52 weeks) only are payable. For definition of "total" see under (i) Accidents, above. Confinement to the house is not necessary. An insured can be permitted to go out provided he does no work.

Partial disability or convalescence—no benefit payable.

(iii) *Illness under All Illness policy.*

Total benefit. For definition of "total" see under (i) Accident, but to qualify for benefit confinement to the house is necessary (limit 26 weeks).

Partial benefit—not payable for illness.

Convalescence benefit is payable when the insured is not necessarily confined to the house though still totally disabled. Limit four weeks.

If the case is a simple one and the disablement is likely to be of only a few weeks duration, it is customary to make the insured an offer to settle based upon his medical man's estimate of the period for which he is likely to be disabled. If the insured does not wish

to settle in advance, then it is desirable to keep in close touch with the case so that the periods of total and partial disablement can be agreed as and when they cease.

Some companies issue a final claim form, with a further report form for the insured's medical attendant, to be completed when the disablement ceases, but the majority of claims hardly warrant this procedure.

If the report given by the insured's own doctor is vague or inadequate in any respect, or if the period of disablement appears to be prolonged, it may be desirable to have an independent medical examination at the company's expense as provided in the conditions of the policy.

If the insured has been injured through the negligence of some other person, the liability under the policy is not affected. The policy is not one of indemnity and there is no question of subrogation. It is competent for the insured to receive both policy benefits and damages.

It is not usual to make payments on account, and though occasionally this may be done in special circumstances at the request of the insured, the companies discourage claimants from requesting such advances. The policy provides that claims shall be settled by one payment covering the whole of the liability for total and partial disablement.

Having once settled the claim, an insured is not entitled to reopen it if his disability is prolonged beyond the period for which a payment has been made.

When notice of claim is received a note should be made not to invite or permit renewal of the policy until the claim has been adjusted and the insured is again in normal health.

In the case of claims for temporary total or partial disablement it is customary to take a discharge in some such terms as these—

> Received from the . Insurance Company Ltd., the sum of . pounds, shillings in full discharge of all claims under Policy No. . in respect of all injuries or injurious results direct or indirect arising or that may arise from an accident which occurred to me on or about the . .
>
> £ : :

and the policy is continued without any additional premium being required, there being nothing in the nature of a reinstatement though, of course, the policy may require modification as a consequence of the injury.

After settlement has been arranged it should be considered whether there is anything in connection with the circumstances of the

claim which renders it undesirable to invite renewal. Contact with the insured may reveal that he is not a good risk on account of his health, habits, occupation, proneness to accidents or to diseases of a particular type, or because of his extravagant views and unreasonable attitude in negotiating a settlement of the claim. Some of these features may be dealt with by restricting the cover of the policy, whilst others make it undesirable to continue the insurance.

On being notified of the death of the insured by accident, the company usually issues a fatal accident claim form, but in view of the shortness of time it is quite impossible to wait for its return before commencing investigations. It is, therefore, necessary to investigate the matter at once and the following points should be borne in mind—

(1) A capital sum for death is payable only if there is evidence of death being due to accident.

(2) It may be desirable to be legally represented at the inquest.

(3) If the Coroner has not ordered a post mortem examination it may be desirable to arrange for one. If one has been ordered, the Coroner may agree to the company's doctor being present.

(4) If notice was not given in time for the foregoing, the fullest explanation should be called for.

(5) It may be desirable for a claims inspector to attend the inquest and take a note of the evidence. If necessary a copy of the depositions can be obtained from the Coroner for a small fee. The Coroner's verdict does not in any way settle the question of liability, but the inquest is useful in bringing out the facts.

(6) It is not necessary to be suspicious in all cases, but it is necessary to be satisfied that the circumstances are clearly accidental. Details of insured's state of health and his business and private life may have a bearing upon the question of motive. Whether the scene of the accident lies on the direct route to some place which the insured was known to be visiting, and whether he had unimpaired hearing and sight, may also be important considerations. Where suicide is suspected, though the circumstances may be convincing it is well to make note of other defences, e.g., delay in giving notice, failure to notify impairment of health on renewal, or flaw in the proposal form. Suicide is a difficult thing to prove—the presumption is against suicide—and therefore additional defences may be useful to strengthen the case.

(7) Certain types of accident entitle to double benefit.

In a fatal case it is usual to take a discharge on the policy, which is thereby cancelled. No stamp is required for this it being covered by the stamp on the policy.

The amount is payable to the legal personal representatives, and the production of probate or letters of administration must be asked for.

It is possible that a notice of assignment has been registered, in which case the question of title will need to be gone into.

The benefits payable for permanent total or partial disablement may be increased by bonus additions or doubled if the accident occurred in certain circumstances. On the other hand the capital sums are reduced by any payments which have been made to the insured during the current year of insurance.

In most cases there is little difficulty in satisfying oneself that permanent disablement as defined by the policy has been sustained, but in cases where there can be any difference of opinion an independent medical examination should be arranged.

The payment of the capital sum is subject to the cancellation of the policy.

In the case of claims for a pension or for blindness or paralysis, it is desirable to have the best medical opinion available as to whether the disability will in all probability continue for the remainder of life.

CHAPTER IX

DRIVERS INSURANCE CLAIMS

ON notice being received, if the claim is one which is apparently covered by the policy the appropriate claim form is issued.

The form, of which a typical example is given on page 125, calls for no special comment except that attention should be called to Question No. 9.

It is well to see at once—

(1) If notice has been given to the company as soon as the accident came to the knowledge of the insured.

(2) If the number of drivers employed by the insured on the day of the accident exceeded the number covered by the policy. If so, and if the increase has taken place since the last renewal, no question will arise as the increased number can be included by the insured in his next declaration. Otherwise the question whether the claim should be dealt with under the policy will arise.

(3) Whether if the damage is to insured's own vehicle or horse it is covered by the policy. Vehicles and horses of normal value are not specified individually in the policy but those of higher value are usually specifically insured.

The following risks are not usually covered by the policy.

(1) Liability for injury to persons in the service of the insured, to members of his family, to persons being conveyed, or to anyone entering or dismounting from the vehicle with his consent.

(2) Liability for damage to property in the custody or under the control of the insured or his servants or a member of his family. Goods on the vehicle come within the exclusion unless they are specifically insured.

(3) Liability for damage to bridges, weighbridges, roads, or anything beneath caused by the weight or vibration of the vehicle.

(4) Liability for damage due to or consequent upon fire or explosion.

(5) Damage to vehicles, harness or lamps due to breakdown or to wear and tear.

(6) Damage or loss resulting from earthquake, riot and/or civil commotion or any consequence, whether direct or indirect, or war, invasion or act of foreign enemy.

In the absence of any facts disentitling an insured to the usual protection of the policy, investigation should be directed towards

DRIVING INSURANCE CLAIM FORM

IT IS ABSOLUTELY NECESSARY THAT THE FOLLOWING QUESTIONS BE ANSWERED FULLY.

1. Name, address and occupation of Insured	Telephone No.
2. (*a*) Date, time, and place of accident .. (*b*) How it occurred .. .. (*Describe fully. If by collision, state with what kind of vehicle.*)	
3. Particulars of injury or damage (*state fully*)	
4. Name and address of Person injured, or of Owner of property damaged ..	
5. (*a*) Name and address of Driver .. (*b*) Where was he at time of accident and was he on your business ? .. . (*c*) Was any person accompanying him ? (*d*) When did he report it, and to whom ? (*e*) How long in your service ? (*f*) Age.. (*g*) Is he accustomed to driving ? .. (*h*) Was he perfectly sober at time of accident ? .. .. (*i*) Has he been concerned in any previous accident ? If so, please give particulars	(*e*) (*f*) years.
6. (*a*) Description of your horse and vehicle concerned. Was it loaded or empty ? (*b*) Was it on its near side ? If so, how far from kerb ? If not, in what part of the road was it, and at what pace was it going ?.. .. .. (*c*) Has the horse any known vice ? (*d*) How long in your possession ? (*e*) What age ?	(*c*) (*d*) (*e*) yrs.
7. (*a*) Names and addresses of Witnesses ? (*If none taken, state why.*) (*b*) Was accident witnessed by Police ?.. (*c*) Were any particulars taken by Police? (*d*) Give Policeman's number	
8. Has any claim been made upon you ? If so, when, by whom, and for what amount ?	
9. (*a*) How many drivers were employed by you on day of accident ? .. .. (*b*) How many horses do you own ? ..	
10. Have you any other insurances in force : (*a*) Covering your Driving risk ? .. (*b*) Covering your Live Stock ? ..	(*a*) (*b*)

Date 19 Signature

ascertaining the proximate cause of the accident. The policy is one of indemnity and the insured is equally safeguarded by the claim being paid or being defended by the company.

In almost every case the sole point for decision is " Was the insured or his servant guilty of negligence, i.e., absence of reasonable care ? " Circumstances vary, but information on the following points, obtained if possible by personal investigation, will prove helpful in reaching a decision—

(1) A sketch of the scene of the accident showing the position of the vehicles, property or persons involved.

(2) The character, age, physical condition and experience of the driver, whether he has been concerned in previous accidents, if sober, etc.

(3) Whether the horse has been involved in previous accidents, the disposition of the horse, if free from vice, etc.

(4) Whether the vehicle was unattended.

(5) If in charge of a driver, if he was—

(*a*) Driving at a normal speed and keeping a proper look-out.

(*b*) Observing the rule of the road by being on his proper side. Being on the wrong side of the road is not necessarily negligence but in such a position a driver must use extra care.

(*c*) Using ordinary skill in the management of the horse.

(*d*) Taking reasonable steps to avoid an accident as for instance stopping or turning the vehicle. It is no excuse to plead that a warning was given if the driver should have stopped.

(6) If the vehicle was fit for use on a public highway.

(7) The time at which the accident occurred. If at night whether proper lights were being carried and were in use.

(8) Whether the accident occurred on a gradient or on the level and whether, if due to the gradient, the brakes were adequate, in good order and in use.

(9) Whether the accident was reported to or witnessed by the Police. If so, a copy of the Police Report should be obtained.

(10) A description of the occurrence and the events leading up to the accident. Where the vehicle or vehicles stopped after the accident.

A plea of inevitable accident s a good defence. Such a plea can be sustained by showing that the accident could not have been prevented by the exercise of ordinary care. Examples are—

(1) A horse driven in a careful manner by an experienced driver suddenly bolting under exceptional circumstances, such as the unexpected emission of steam by a motor waggon.

(2) A pedestrian stepping off the pavement without warning.

If the person who is claiming was himself negligent at the time of the accident, and if his negligence was the decisive cause of the accident, then contributory negligence on his part may be a complete answer to his claim. It is difficult, if not impossible, to use the plea of contributory negligence in the case of very young or aged or infirm persons.

Claimants and drivers of vehicles in accidents are naturally " interested parties " and the testimony of independent witnesses is of primary importance. Written and signed statements of witnesses should be obtained promptly when possible, and in claims where any considerable amount is at stake it is often well to arrange for a witness to revisit the scene of the accident and reconstruct it on the spot.

Where it is impracticable to interview a witness he should be communicated with and requested to reply to questions which can be submitted to him in accordance with the known facts, or the printed witnesses form which most companies use can be sent.

A specimen of such a form will be found in the Motor Claims chapter.

The usefulness of a witness may be judged by—

(1) His apparent truthfulness.

(2) Whether he was in a good position to observe what he states.

(3) The manner in which he is likely to impress the Court.

In the case of personal injury claims, an early independent medical examination is desirable. There is no legal right to medical examination such as was given by the Workmen's Compensation Act. The injured party therefore has a right to have his medical attendant present, and the company must pay his reasonable fee. If it can be agreed that this fee shall be costs in the action and therefore depend upon the result, so much the better.

An early settlement should be sought. The amount will depend upon the nature of the injuries, the age, sex and social and financial position of the claimant, but all claims tend to grow the longer they are outstanding.

If the insured's own vehicle has been damaged it is necessary to ascertain—

(1) Whether the vehicle was damaged under circumstances which give rise to a claim under the policy, i.e., whether it was at the time being used on the insured's business and being drawn by a horse.

(2) Whether the damage was accidental as distinct from wear and tear.

(3) If the vehicle is not specifically insured, whether the amount of damage is within the policy limit.

(4) If the whole of the repairs are due to the accident.

(5) If there is a possibility of recovering the amount from a third party.

(6) If the insured's vehicle was in collision with some other vehicle or cycle, the insurers of the latter should be ascertained. The case may fall to be dealt with under a knock-for-knock or halving agreement. A separate third-party claims-sharing agreement may also apply to any third party claim made against one or other of the vehicle owners.

If the claim is for fatal injury to the insured's horse, the following points should be noted—

(1) The injury must be fatal within the time limit mentioned in the policy, and must be due to the accident.

(2) It must have occurred whilst the horse was attached to a vehicle owned by the insured or for which the insured was responsible, engaged on the business of the insured.

(3) The insured must at his own expense have secured the attention of a qualified veterinary surgeon.

(4) An opportunity must have been afforded to the company to have a post mortem examination before the carcase is disposed of.

(5) It is important that the report of an independent veterinary surgeon should be obtained as to the cause of death and the value of the horse.

(6) Liability is restricted to the policy limit unless the horse was insured specifically.

(7) Whether there is a possibility of making a recovery from a third party.

This class of policy usually contains a limit as to the amount of the indemnity and this limit applies in priority to the insured, as the policy indemnifies—

(*a*) the insured, and

(*b*) any permitted driver.

If (*a*) and (*b*) are sued jointly, then the company is liable only up to the actual limit in the policy for any one accident. The insured has " first call " on the amount to be paid, if necessary up to the limit of indemnity and (*b*) is indemnified up to the balance, if any.

As unfortunately there are still many policies with relatively small monetary limits, the question of paying this amount to the insured and leaving him to dispose of the claim may arise.

CHAPTER X

PLATE GLASS CLAIMS

THERE was probably no class of insurance that was more affected by the war than plate glass, and conditions have hardly returned to normal yet, but war restrictions are gradually passing and have been disregarded in this chapter, which deals with the business as it was and as we hope it will soon be again.

In no section is prompt claim service more essential. If a shop window is broken, it has to be replaced at once. The shopkeeper is always anxious not to be deprived of his silent salesman, as his windows are termed, for longer than is necessary. For this reason companies often made a practice of instructing glaziers to replace the glass immediately. If by any chance the particular pane was not included in the policy or was not properly described, the matter can be adjusted afterwards. To meet the position the following clause can be inserted in the claim form—

" To avoid delay in instructing glaziers I agree that if it is found that the glass is not covered by the policy I will reimburse to the company the amount of the cost of such replacement."

A specimen of the claim form in use is given on page 130.

A claim can be dealt with by one of the following methods—

(1) Pay to the insured the current cost of replacing the glass (less the value of the salvage, if any) or its declared value should such be specified in the policy.

(2) Replace with glass of a similar description and quality.

All glass is considered flat and plain and of ordinary glazing unless otherwise described in the policy and no bevelling, embossing, lettering, painting, silvering, or other design or work of any kind is deemed to be insured unless it is specifically described in the policy.

The companies have arrangements with glaziers in all the large towns who specialize in insurance work and effect prompt replacements. In other places it may be necessary to obtain competitive estimates. The big firms work on a tariff, allowing the companies special terms.

It is necessary, on receipt of the estimate, to compare the size and character of the glass with the glass covered by the policy. In some cases where no estimate is obtained the comparison must be made with the account, and if the glass was not insured then the matter must be adjusted with the insured.

GLASS INSURANCE CLAIM FORM

1. Name	
Address	
Address where Breakage occurred	*Policy No.*
2. Cause of Breakage .. (*State as fully as possible*).	
3. If caused by a person NOT in your service state name and full address ..	
4. Names and Addresses of any Witnesses	
5. Are you claiming as tenant or owner ?..	
6. Are premises at present occupied ?	
7. State if immediate replacement is desired or whether you would prefer to have a Guarantee to effect replacement at your convenience	

8. PARTICULARS OF BREAKAGE

Date of Breakage				Number of Squares	Whether Window, Door, etc.	Kind of Glass broken	Sizes in inches		Whether Cracked or Broken out
Day	Month	Year	Time				Ht.	W'h	

I/We declare the above statements to be true.

DATE . 194 SIGNATURE

Often an insured gives instructions for all his glass to be covered. The glass is measured up by the company's official for the purpose of calculating the premium. It is a tedious and sometimes lengthy job, and panes may be missed or wrongly measured. It is customary in all such cases to replace subject to additional premium.

Unless specially insured, the policy does not cover damage to woodwork or the removal or replacement of fixtures and fittings.

This expense must be borne by the insured. Boarding up expenses are now usually covered by the policy.

It is the practice for the glazier to obtain a " satisfaction note " from the insured when he completes a replacement, and this he attaches to his invoice. It is usually in the following form.

.. ..194 . ..

CERTIFICATE OF SATISFACTORY REPLACEMENT

I HEREBY CERTIFY that the replacement of Glass insured under Policy G . . . .in the INSURANCE COMPANY LIMITED, has been effected to my entire satisfaction.

Glazier's Name . . .. *Signature of Insured*

Address ... .

.. ..

No Glazier's account will be paid unless accompanied by this certificate, duly signed by the insured.

When the breakage is slight, such as a crack across the corner of the pane, the insured may not desire an immediate replacement. This may be because he does not think it necessary, or for the reason that it will occasion him some inconvenience or expense. In such cases the company is agreeable to the replacement being deferred and gives the insured a letter undertaking to make the replacement when called upon to do so. It is often wise to ring the crack with a diamond to prevent its spreading.

All such cases must be carefully recorded and estimated for in the outstandings at the close of the year. As many of these cases are never heard of again, the amount of these outstandings constitutes a valuable hidden reserve.

The cases where the insured requires a cash payment do not often occur but sometimes an insured is proposing to carry out structural alterations and does not wish the old glass replaced. In such a case the cost of replacement less the value of any salvage is paid.

The salvage is not usually of any great value, for when trimmed it seldom produces a pane of any size. Many glaziers accept the salvage instead of making a charge for hacking out and glazing (H.O. & G.)

A glass policy is one of indemnity, and if the breakage is caused by a third party the company is subrogated to any rights of the

insured and is entitled by the terms of the policy to use the name of the insured in any endeavour to recover. Where the third party is insured, the matter is usually settled under the terms of a claims agreement.

A difficult proposition presents itself in the case of breakages caused by stones thrown up by passing vehicles, and there is little hope of recovery unless it can be proved that road repairs or other work was actually being carried on outside or near the premises in which the glass is fixed and that there was negligence on the part of the contractors in not properly guarding their work or material.

Children throwing stones or other missiles are responsible for a number of breakages, particularly when the glass is in close proximity to a school, and generally it is useless for the company to make any claim against a child who has no property, and his or her parents are not liable at law although the latter sometimes feel a moral responsibility and meet the company to a certain extent.

The companies do not hold an employee of the insured responsible for any breakage whether caused through negligence or otherwise.

The Riot (Damages) Act, 1886, provides that if a house, shop or building (which, by Sect. 9, includes any premises appurtenant to the same) in any Police District has been injured or destroyed or the property therein has been injured, stolen or destroyed " by any persons riotously or tumultuously assembled together," compensation shall be payable out of the Police rate to the person who suffered the loss, provided he was not a party to the riot or accessory to it and provided also that he had not by his conduct incited the riot. Property in the open would seem to be excluded, but by Sect. 6 (*b*) the provisions of the Act are applicable to manufacturing or agricultural machinery and to mine and quarry plant. Where the person who sustained damage has made a claim upon his insurance company, he will have no claim under the Act against the local authority except for any balance of loss not covered by the insurance. This, however, does not relieve the local authority, for although the insured person can claim only for the uncovered balance of the loss, his insurance company is entitled to be compensated for the amount paid by them by way of indemnity, and in such a case the policy must continue in force as if no payment had been made. This means that the ordinary rule that a loss payment reduces the sum insured does not apply. The word " riot " is not defined in the Act, but it would have the meaning assigned to it in *Field* v. *Receiver for Metropolitan Police*, [1907] 2 K.B. 853.

Generally speaking the question of recovery is considered on its merits. In certain cases it is obvious that it would not be advisable

to press a claim, as when a valued customer of the insured may quite by accident drop his stick or umbrella and break a piece of glass in a showcase, and no good purpose is served by endeavouring to claim from any person who is not in a position to pay or contribute towards the cost of making good the damage.

The policy does not cover damage due directly or indirectly to war, consequently care should be taken to see that breakages due to this cause are not admitted.

CHAPTER XI

LIVE STOCK CLAIMS

WHILE in the main the practice applying to these claims is the same as that obtaining in other classes of accident business, there are one or two special features.

It is a condition of the policy that not only immediate notice be given of the death of an insured animal but also that, in the event of an accident to or illness of an insured animal, the insured shall at his own expense immediately provide adequate attendance and treatment by a qualified veterinary surgeon and at once advise the company.

In the event of death a claim form must be completed by the insured, who must also furnish at his own expense a qualified veterinary surgeon's certificate.

These should be examined to see that—

(*a*) death was not due to any of the causes excluded in the policy;

(*b*) the animal had received adequate veterinary attention since the inception of the illness or occurrence of the accident;

(*c*) the animal is identical with that described in the proposal form;

(*d*) the age and value of the animal as stated by the veterinary surgeon correspond with the particulars given in the proposal form.

It often comes to light that the animal was considerably older than stated in the proposal or that the animal has been ailing for a long time notwithstanding the signing of a declaration of soundness and good health by the insured at the time of the acceptance of the risk. The onus is upon the company to prove the misstatement of age in the proposal form and that it was made knowingly by the insured.

The period of cover is clearly set forth in the policy and no claim is entertained unless the insured animal dies within the currency of the insurance from any accident or disease occurring or contracted during the said period.

It is particularly important in the case of foaling risks to know the date of the foaling as on this depends, in some cases, the period of insurance.

An insured animal must not be slaughtered without the consent of the company being first obtained unless it is essential that the animal be immediately destroyed in the interests of humanity. In

cases where an animal is destroyed under the Diseases of Animals Acts, 1894 to 1927, or under any order of the Privy Council, Ministry of Agriculture or any local authority, no compensation is payable under the policy.

The insured must at once advise the death of an insured animal by telegraph or telephone, if possible, and the carcass must not be removed or parted with until the expiration of twenty-four hours after such notice. The company has the right to have a post mortem if it so desires.

The sum payable on the death of an insured animal is the market value of such animal not exceeding the sum insured thereon, less any sum realized by the sale of the carcass and/or hide.

Enquiries should be made to ascertain whether any other insurance covering the animal is in force, e.g., the insured may have a driving accidents policy providing cover in respect of fatal injury to horses.

In some instances the agent is asked to furnish a report in a form on the following lines—

AGENT'S REPORT ON CLAIM FOR LOSS

Name of Insured Policy No.

(Please fill in paragraphs (*b*) and (*c*) in connection with claims for Foals and paragraphs (*a*) and (*c*) in connection with all other claims).

(*a*) I have seen the dead claimed for and I am satisfied from enquiries I have made that it is the animal insured under this policy,

(*b*) I have seen the dead foal claimed for and I am satisfied from enquiries I have made that it was out of the mare named insured under this policy,

(*c*) The full premium was paid to me by the Insured on the

Date 194 Signature of Agent

The following specimens of claim forms call for no special comment—

CLAIM FOR LOSS BY DEATH

To be lodged with the Company, along with Veterinary Certificate within 14 days after the death

Claimant's Name and Address }

Policy No. . . . . . .

DESCRIPTION OF ANIMAL

No in Schedule of Policy	Name	Age	Colour	Marks of Identity	Sex	Breed	Market Value	Insured Value	Cause of Death
							£	£	

The animal took ill, or met with accident on	Notice was sent to the Company on	My Veterinary Surgeon was called on	Death or Slaughter took place on
the day of	the day of	the day of	the day of

1. For what purpose was the animal used ?	
2. How long was it in your possession ?	
3. What caused the disease or accident ? (*a*) If accident, was it the fault of any other than your driver ; give particulars of time and place. (*b*) Names and Addresses of witnesses of accident ?	
4. When was the animal last at work ?	
5. Name of Veterinary Surgeon attending. (*The V.S. Certificate should accompany this form*).	
6. If the animal was purchased, what sum did you pay for it ?	
7. How much did you obtain for the salvage ? (*Voucher from the Purchaser should be sent*).	
8. Was the animal insured elsewhere ? If so, give name of office or Society ?	
9. When did you pay the premium ?	19 to (*Name of Agent*)
10. How many animals of same class are now on your premises ?	
11. If claim for a foaling Mare :— (*a*) When was the Mare due to foal ? (*b*) When did the foaling take place ? (*c*) Has this Mare foaled before ? If so, when ? (*d*) How many in-foal Mares have you this season both foaled and to foal ?	

I warrant the truth of the answers to the foregoing questions, to the best of my information, knowledge, and belief; and I declare that the conditions of my Insurance have been complied with in every respect as required by the Company.

Dated . 19 Signature of Owner

CLAIM FOR LOSS OF FOAL BY DEATH

Claimant's Name and Address } *Policy No.*

DESCRIPTION OF THE FOAL						Cause of Death
Date of Birth	Colour	Marks of Identity	Sex	Breed	Insured Value	
					£	

The Foal became ill or met with accident on	Notice was sent to the Company on	My Veterinary Surgeon was called on	Death or Slaughter took place on
the day of	the day of	the day of	the day of

Particulars of the dam of the Foal	Name	Age	Colour	Breed	Value £	Year of last Foaling

How much did you obtain for the Salvage ?	
Was the animal insured elsewhere ? If so, give name of Office or Society ..	
When did you pay the premium ? ..	19 to *(Name of Agent).*

I warrant the truth of the answers to the foregoing questions and I declare that the conditions of my insurance have been complied with as required by the Company.

Dated 19 Signature of Owner ..

CERTIFICATE OF CORROBORATION

(To be completed by Veterinary Surgeon if one attended ; otherwise by a responsible neighbour).

I hereby certify that the above particulars and answers are true to the best of my information knowledge and belief.

Signature

Address

Occupation

VETERINARY SURGEON'S CERTIFICATE

To be supplied by Insured, at his own expense, in support of a Claim

I hereby Certify that I attended the Animal described below, belonging to Mr. . . . . of . . . . . from the . . . day of . . . to the . . day of . . . and that it died at . . . . . o'clock, on the . . day of . . . the cause of death being . . . . . .

DESCRIPTION OF THE ANIMAL REFERRED TO

Name	Age	Colour	Marks of Identity	Sex	Breed	Market Value

1. If post-mortem was made please give results.	
2. If death was due to disease, state how the disease was caused.	
3. If death was due to an accident, state how, when, and where the accident occurred.	
4. Do you identify the animal as one which you examined for insurance ?	
5. In your opinion have proper care and treatment been given both before and after the illness or accident ?	
6. What was the animal's employment ?	
7. Give any observations on the case.	

Signed ..... M.R.C.V.S
F.R.C.V.S.

Dated..... Address .....

CHAPTER XII

PROPERTY OWNERS' LIABILITY CLAIMS

THIS class is really a section of third party general business. It has, however, one distinctive feature in that the indemnity is not against liability for negligence but in respect of damages for breach of contract. In third party policies generally, liability under contract is not covered.

The position arises in this way. The tenant has no claim upon his landlord for damages for personal injuries or damage to personal property due to the condition of the premises, unless there has been some breach of the tenancy agreement. Unless such responsibility for the condition of the premises is specially contracted for, the landlord is not liable.

In these circumstances, in order to protect the working classes the legislature has imposed an implied condition in certain tenancy agreements, and Sect. 2 of the Housing Act, 1936 provides that—

" In any contract for letting for human habitation a house at a rent not exceeding

(*a*) in the case of a house situate in the administrative county of London £40,

(*b*) in the case of a house situate elsewhere, £26, there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation."

" Provided that the condition and undertaking aforesaid shall not be implied when a house is let for a term of not less than three years upon the terms that it be put by the lessee into a condition reasonably fit for human habitation and the lease is not determinable at the option of either party before the expiration of three years."

Sub-sect. (3) provides that the expression " house " includes part of a house, and in Sub-sect. 4 an exception is made in the case of any house not in London but in a borough or urban district with a population exceeding 50,000 where the rent exceeds £16 if the contract was made prior to 31st July, 1923.

The words " notwithstanding any stipulation to the contrary " make void any contracting out.

It should be noted that, although the landlord may under certain conditions be held liable for injuries sustained by the tenant, he is not answerable for injuries to members of the tenant's family or to persons visiting the premises. The visitors' remedy would be against the tenant. The tenant would, however, be entitled to recover the amount of any expense incurred by him in connection with accidents to members of his family due to structural defects apart from any question of damages.

There are three leading cases which should be noted—

(1) In *Cavalier* v. *Pope*, [1906] A.C. 428, the tenant (Cavalier) had taken a house from the owner (Pope) under a verbal agreement at a monthly rent, the landlord agreeing to do repairs.

Frequent complaints were made by the tenant of the condition of the floor and ceiling of the kitchen. Promises to repair were made but never carried out. The tenant's wife was injured by a chair (upon which she was standing at the time) going through the floor.

An action was raised by the tenant for the loss he had sustained through the injury to his wife, and by his wife for the injury she herself had received.

The tenant's action succeeded, but that of his wife failed on the ground that the contract was made between the owner and the tenant and that nobody except the tenant could recover damages for breach of it.

The Lord Chancellor said—

" I can find no right of action in the wife of the tenant against the landlord either for letting these premises in a dangerous state or for failing to repair them according to his promise . . . the wife was not a party to any contract."

Lord Macnaghten said—

" A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term, for, fraud apart, there is no law against letting a tumbledown house and the tenant's remedy is upon his contract, if any."

(2) The case of *Cameron* v. *Young*, [1908] A.C. 176, settled the same point as regards Scotland. In that case Lord Robertson in the course of his judgment said—

" The landlords were perfectly entitled to let the house or not to let it and in either case they were entitled to allow the house to fall to pieces and the drains with it so long as they did not injure any neighbours or violate any existing law of nuisance, the only restraint on their action being obligations of contract with their tenant."

The question as to whether notice of defect is necessary before there can be liability has been finally decided by *McCarrick* v. *Liverpool Corporation*, [1946] 2 All E.R. 646, (confirming *Morgan* v.

Liverpool Corporation, [1927] 2 K.B. 131; 136 L.T. 622) in the House of Lords.

It was held that the provision imported by statute into the contractual tenancy must be construed in the same way as any other term of the tenancy, and so construed did not impose any obligation on the landlord unless and until he had notice of the defect which rendered the dwelling not reasonably fit for human habitation.

Apart from this statutory exception there is no implied promise on the part of a landlord on the letting of a house (other than a furnished house to which a special rule applies) as to its physical condition, or that it shall be reasonably fit for habitation, or that it is fit for the purpose for which it is let. It is for the tenant to see the house before he takes it. If he neglects to do so he must take the property as he finds it.

In the case of furnished houses and apartments there is an implied condition that the house is reasonably fit for occupation and comfortable habitation as from the day on which the tenancy is to commence. This implied condition refers to every part of the house as at the commencement of the term, but it is not a continuing warranty. The rule also applies to lodgings let with attendance.

In the absence of express stipulation to the contrary there arises from the relationship of landlord and tenant an implied undertaking by the tenant to use the property demised in a tenant-like manner, doing proper repairs the extent of which will depend upon the nature of the tenancy.

The implied obligation in the case of a tenant from year to year is that the tenant shall keep the premises wind and water tight and make fair and tenantable repairs such as replacing windows or doors broken during his occupancy or clearing drains and sewers. The tenant is not answerable for mere wear and tear or if the premises are burnt down, nor is he bound to rebuild them if they become ruinous by any other accident, nor to replace doors and sashes worn out by time, to put a new roof on, or to make similar substantial and lasting repairs or to do what are called general repairs.

The implied obligation on a tenant in a lease for a term of years has never been clearly defined. The question seldom arises as such leases generally contain an express covenant to repair.

Liability for accidents may arise under the tort of nuisance or the tort of negligence.

The occupier of premises is primarily liable for all nuisances which exist upon them during his occupancy. His duty is not merely to refrain from positive acts of misfeasance but to prevent any nuisances coming into existence and to abate them if they do.

The tenant is therefore responsible if his house falls into disrepair so as to be a danger to those using the adjoining highway, and he is also responsible for a nuisance which existed before he came into occupation. It is his duty to abate the nuisance. So an occupier of a house was held liable for a dangerous and unfenced area abutting on the street, although it was in the same condition when his occupation commenced.

Where, however, the nuisance is created without the act, authority or permission of the occupier, he is not liable. So where a branch off a beech tree growing on the defendant's estate, which had been carefully inspected a few months before, broke off without warning or apparent cause at a distance of 15 feet from the trunk of the tree and fell upon a motor coach, causing damage, it was held there was no liability.

Though the responsibility is primarily on the occupier, liability being based on possession and the owner as such not being responsible, there are certain exceptions.

Where the landlord has caused the nuisance prior to the lease by a positive act of misfeasance, or where he has authorized the tenant to create or continue the nuisance, the landlord is liable, as also where the nuisance existed at the commencement of the tenancy and the premises were let without any covenant that the tenant should put them in repair.

Again the landlord is liable where there is a breach by him of a covenant in the lease. The landlord's contract to repair may make him liable to persons injured outside the premises through the nuisance, but it will not make him liable to persons entering the premises.

The responsibility of the occupier towards persons on the premises varies according to whether those persons are lawfully there or are trespassers.

Persons lawfully on the premises are of two kinds—

(*a*) those who enter in pursuance of a contract between themselves and the occupier, such as the audience in a theatre, and

(*b*) those between whom and the occupier there exists no such contractual relationship, e.g., a postman delivering letters.

Where there is a contract between the plaintiff and the defendant in pursuance of which the plaintiff has entered the premises, the liability depends upon the express or implied terms of the particular contract. The question really pertains to the law of contract. The parties are free to make what bargain they choose as to responsibility for accidents, and in such a case the only difficulty is in interpreting it and applying it to the facts—but such express terms are rare.

There is no universal rule regarding the implied terms as to duty and responsibility which the law imposes, but such contracts can be broadly said to fall into two categories—

(1) when the occupier impliedly guarantees the safety of the premises, and

(2) where there is no such guarantee but merely an implied undertaking by the occupier to use due care in making and keeping the premises safe.

In *Maclenan* v. *Segar*, [1917] 2 K.B. 325, McCardie J. stated the rule thus—

" Where the occupier of premises agrees for reward that a person shall have the right to enter and use those for a mutually contemplated purpose the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them."

Whereas in the case of *Dunster* v. *Hollis*, [1918] 2 K.B. 795, the defendant let rooms in a building to the plaintiff but retained in his own possession the common staircase, he impliedly undertook towards the plaintiff the duty of care in respect of the safe condition of the staircase as the agreed means of access to the rooms let.

In breach of this duty he allowed the staircase to fall into a dangerous condition of disrepair, which condition was visible and obvious and well known to the plaintiff. Nevertheless the plaintiff was held entitled to recover damages for an accident caused through the use of the staircase.

Apart from contract there are two ways in which a man may lawfully enter upon premises in the occupation of another—

(1) By permission, express or implied, as in the case of a customer in a shop.

(2) By right, as in the case of an officer entering to execute legal process.

Entry by permission of the occupier is of two kinds—

(1) Invitation.

(2) License.

A person invited to enter is usually termed an invitee. A person who is merely licensed to enter is distinguished as a licensee.

An invitee is a person who enters on the premises by permission of the occupier, granted in a matter in which the occupier has himself some pecuniary or material interest, as for example a person who receives permission from the occupier as a matter of business and not as of grace, e.g., a customer in a shop, while a licensee is a person who enters on the premises by permission of the occupier granted

gratuitously in a matter in which the occupier himself has no interest, e.g., a guest at a private house.

In other words an invitation is a request to enter for the purposes of the occupier, a licence is a permission to enter for the purposes of the entrant himself. The distinction is important as the duty of an occupier to an invitee is greater than to a licensee. To some extent a licensee is required to look after himself and to run the risk of dangers which an invitee is entitled to be protected from by the care of the occupier.

In the present state of the authorities it is difficult to say exactly where the line is to be drawn, but the difference undoubtedly exists.

The lowest degree of care is owed to a trespasser. A trespasser is a person who has no right of any kind to come upon the premises. A trespasser cannot complain of the state of the premises and cannot recover for injuries due to their lack of repair. It is, however, different when there is a wilful injury or negligent misfeasance, and also where a person accidentally deviates from the highway and consequently unwittingly or innocently trespasses on the defendant's land, e.g., to avoid an unsafe road where excavations have been made. In such circumstances it has been held that there is liability.

It is necessary to preface the remarks on the investigation of property owners' claims with this short summary of the legal position, as it is essential at the outset to decide, or to obtain the facts on which a decision can be made, as to the legal relationship of the parties and the consequent liability which arises. There is, therefore, an additional point for investigation in these claims.

It is sometimes difficult, when an insured is both owner and tenant, to define where his liabilities as an owner (as covered by a property owner's policy) cease and where his liabilities as tenant (as covered by a third party policy) begin, but from the property owners' policy point of view the liabilities are reduced because the tenant cannot claim against himself as owner, and the policy in that case is largely reduced to one of indemnity against possible claims by the public.

When dealing with claims, the following points should be kept in mind—

(1) Is the property upon which the accident occurred covered by the policy ?

(2) What is the legal relationship between the insured and the injured person.

(3) What are the circumstances in which the accident occurred ?

(4) Is the person who owns the property or is responsible for its repair someone other than the insured ?

PROPERTY OWNER'S CLAIM FORM

1. Name and address of Insured	
2. Address of property where accident occurred ..	
3. Date, hour and place of accident	
4. Cause (*full information*) ..	
5. If any person was injured, give name, address, and age .. .. .. (*b*) Nature and extent of injuries .. .. .. (*c*) If any property was damaged, give full particulars	
6. (*a*) Is injured person a tenant? If so, state (*i*) for how long, (*ii*) rental, (*iii*) whether rent is paid to date .. (*b*) If not a tenant is he (*i*) a member of tenant's family or (*ii*) a lodger? .. (*c*) If medically attended give name and address of Doctor	(*a*) (*i*) (*ii*) (*iii*) (*b*) (*i*) (*ii*)
7. Names and addresses of witnesses of the accident ..	
8. Has any communication, verbal or written, been made to you by or on behalf of any injured person or owner of property damaged? If so, give particulars. (*Any written communications received should accompany this form*).	
9. Have any steps been taken to compromise or settle the matter in any way? If so, what, and by whom? ..	
10. (*a*) Have any complaints bearing on the cause of the accident been made previously? .. .. .. (*b*) If so, when and to whom?	(*a*) (*b*)
11. When was property last inspected?	

I/We hereby declare that, to the best of my/our knowledge and belief, the above statements are fully and truly made.

Date .. . . . 19 . *Insured's Signature* .. ..

The cover is limited to the insured's liability and he cannot have such liability for damage to his own property. If the tenant is responsible for the interior decorations, and if those decorations are damaged through a defect for which the owner is liable, then the tenant's claim for renewing the decorations would have to be met, although seemingly the owner's own property was being repaired. If, however, the owner is liable to make good the decorations then no claim arises.

(5) If the accident arises in a part of the building which is in private tenure, no person but the tenant has any right of action against the owner. The tenant may be liable to third parties and he may in turn be able to claim indemnity.

(6) If the accident occurred in a part of the premises open to the public, e.g., a common staircase, to make the owner liable it must be due to what is known as a concealed trap, i.e., a defect which was known to the owner but which was not known or obvious to the injured party.

(7) Was the defect something over which the owner had control? For example, a leakage from a gas or water pipe laid in the plaster work of a house would not necessarily render the owner liable, inasmuch as he could not reasonably be expected to examine the pipes in that position. If the pipes were manifestly inadequate for their purpose liability might arise.

(8) If a defect was known to the tenant and not reported, then no claim can be made by him for subsequent injury unless it is shown that the owner has failed to carry out some duty on his part to inspect and remedy defects.

A specimen of the claim form used is given on page 145. It calls for no special comment.

CHAPTER XIII

RECEIPTS IN DISCHARGE

THE concluding operation in regard to any claim is the obtaining of a receipt for the payment. It is a relatively unimportant matter. Very seldom is an attempt made to repudiate a settlement. This is, of course, quite a different thing from reopening a claim, which may be quite legitimate in certain circumstances.

Speaking generally a receipt is not conclusive evidence, but merely presumptive evidence—that is, it may be rebutted. Further, to constitute a discharge in respect of possible future liability there must be consideration, and the document must be stamped as an agreement with the duty of 6d. For example, if a personal accident policyholder, at the expiration of six weeks disablement for which the benefit is £6 per week, is asked to sign a receipt for £36 in full discharge of all present and future claims arising out of the accident, there is no consideration. The amount in question is what is already due to him. If a further amount, however small, is added to the amount accrued then there is consideration for the discharge and provided the receipt is adequately stamped it is binding.

Before discussing discharges there is one point which should be cleared up—whether the policy exhausts and needs reinstatement. The practice varies in the different sections. In burglary insurance the sum insured is reduced by the amount paid, and if the original sum is to be continued the insurance must be reinstated by the payment of a further proportionate premium. This follows the fire practice, but neither department enforces it in respect of small claims.

On the other hand a third party policy does not exhaust, and if a claim for the full amount of the indemnity is paid, it continues in force for the full amount of the indemnity for the remainder of the period of insurance.

The point in regard to motor policies is in rather a different position. It was decided in *Tattersall* v. *Drysdale* (1935), 51 T.L.R. 405 and *Rogerson* v. *Scottish Automobile & General Insurance Co.* (1931), 48 T.L.R. 17, H.L., that the subject matter of the insurance was the motor-car and when this has been destroyed the whole policy is at an end. The tariff offices decided that, notwithstanding the legal position, they would regard the policy as operative for the remainder of the term, but all the other Offices were not disposed to

act similarly and as a consequence two claims-sharing agreements were drawn up, one for use by Offices which construe their policies as remaining in force after the ceasing of the insured's insurable interest in the vehicle referred to in the policy schedule, and one for use by Offices which do not so construe their policies.

In the case of personal accident policies the practice has tended in the other direction. The policy is regarded as cancelled on the payment of any capital sum. Quite obviously the insurance must end when the insured is fatally injured, but the same course is followed when a payment for the loss of one limb is made. From a practical point of view it might not be desirable to continue the insurance of a one-limbed man but, apart from this consideration, the contract, which is in a sense a comprehensive policy and covers various contingencies, is hardly fulfilled by the payment of one of the benefits. The policy, however, clearly deals with the subject in the conditions.

It seems, in short, to be merely a question of established practice and is perhaps not always logical. There is, however, nothing to prevent a company taking a wide view in such a matter, and after all it is a question of only a pound or two, but the great point is to see that the position is clearly understood by the insured.

The position can be summarized thus—

Burglary and All Risks.	Policy exhausts. Insured property has gone. New premium to insure replacements.
Third Party and Drivers.	Does not exhaust.
Fidelity Guarantee.	Cancelled on payment of claim. The honesty of the person guaranteed is insured. He has lost his honesty.
Live Stock.	Cancelled on payment of death claims and also on payment of other claims.
Personal Accident.	Cancelled on payment of capital sum. The matter generally is provided for in the policy conditions.
Property Owner's Indemnity.	Does not exhaust.
Motor.	Practice varies.

In all claims of a moderate amount the receipt is usually taken on the back of the cheque, and words such as the following are used—

Received of the . Insurance Company Limited the amount stated on the face hereof in full discharge of all liability (in respect of injury loss or damage sustained on or about the day of 194) (under Policy No. in respect of a burglary which occurred at my premises on or about the . . . . . 194).

The actual words vary according to the class of claim. The signature to the receipt is also intended to act as an endorsement of the cheque and no further acknowledgement is usually required.

Where the payment is made under an all risks or a burglary policy the insured's attention should be drawn to the reduction in the sum insured under the policy in the letter accompanying the cheque.

For payments to doctors, solicitors, assessors, repairers, etc., the following cheque wording is used—

> "Received from the . . Insurance Company Limited the amount stated on the face hereof
>
> Signature .. . .
> Date. .. ..
>
> The signature to the above receipt is also intended to act as an endorsement. No further acknowledgment is required."

A suitable wording for a discharge for payment of a capital sum would be as follows—

Received this day of 19 the sum of pounds in full settlement of all claims under Policy No. in respect of an accident which occurred on or about the day of 19 , in consideration of which the said policy is hereby cancelled and the insurance thereunder declared null and void.

£ : :

Signature . ...

Witness..... ....

In the case of payment of capital sums under personal accident policies, the receipt is usually endorsed on the policy and the company asks for this before handing over the cheque.

In the case of third party claims where they arise under public liability, drivers or motor policies, the position is a little more complicated. Here you are taking a discharge, not from the insured in respect of the contract which you have entered into with him, but from a third party, and the intention is to relieve the insured in respect of his liability for which he is indemnified by the policy.

Where the claim has been handled by solicitors they would in the ordinary way obtain an adequate discharge, but a few general remarks will perhaps not be out of place.

It is essential to see that the discharge adequately protects the insured. His interest has to be considered, as his liability and that of the company may not coincide.

The discharge must be signed and witnessed, and any alterations or additions should be initialed by the person giving the discharge. The witness should be the claimant's solicitor, if one has been consulted, or if not an independent person selected by the claimant. It should be stamped as an agreement with a 6d. stamp.

In certain cases, e.g., payments in respect of injuries to children, where the discharge requires to be signed by the parents or guardians as next friend a special wording is required on the following lines—

Received from . . . . (insert the name of the Insured or other person indemnified) per the . . . . Insurance Company Ltd., the sum of . . . . . pounds in full settlement of all claims we may have in respect of the accident to our infant son . . . . . aged about . . . years which occurred on the . . . . . day of . . . . . 194 .

We agree to indemnify the said . . . . . and the . . . . . Insurance Company Ltd. in respect of any future claim which may be made by or on behalf of our said son.

Dates this . . . . day of . . . . . 194 .

Signature . . . . . (Father)
. . . . . (Mother)
Address . . . . . .
. . . . . .

Witness . . .
Address . . . .
Occupation . . . . .

The following is a wording in the case of fatal injuries where a settlement is made out of Court under a denial of liability.

Received from per the Insurance Company Ltd., the sum of pounds, which is paid without admission of liability and accepted by us on this understanding and in full satisfaction and discharge of and in lieu of litigating all or any claims of whatsoever nature which may or might be competent to us under the Fatal Accidents Acts, 1846, and 1908, or under the Law Reform (Miscellaneous Provisions) Act, 1934, arising directly or indirectly from an accident which occurred on the day of 19 when our infant son, aged about 6 years, received injuries which terminated fatally following an accident in which a motor vehicle belonging to the aforesaid, was involved.

And in consideration of the aforesaid, we hereby agree to indemnify the said, and/or the Insurance Company Ltd., against all or any claims, costs, charges or expenses, which may or might be brought against them by or on behalf of the Administrator or Executor of the deceased aforesaid.

£ : :

Name . . . . . .
Occupation . . . . . .
. . . . . .
Name . . . . . .
(Wife of . . . . . .)
Address . . . . . .

Witness . . . . . .
Address . . . . . .

In the case of husband and wife, a discharge on the following lines would be suitable and the cheque should be drawn in favour of the husband and wife jointly.

Received from . . (Insert name of Insured or other person indemnified) per the . . Insurance Company Ltd., the sum of ... ... pounds in full settlement and discharge of all claims competent to us jointly and/or severally arising out of an accident which occurred on the . .. ... day of . . . .194... .. as a result of which I (*wife*) . sustained personal injuries shock and damage, and I (*husband*) suffered loss and damage.

Dated this . . day of .. . . 194 . .

Signature . . . .

Signature ... .

£ : : (Husband of . . . .aforesaid)

Witness ... . . . Address . . . .

Address . ...

Occupation . . . .

If the payment is made *ex gratia* or with a denial of liability the discharge should be so drawn.

Whenever a substantial sum is paid in respect of serious injuries to a minor, the settlement requires to be approved by the Court and the agreed sum paid into Court. This may be effected by an action being commenced by summons in the County Court, or by the issue of a writ in the High Court. In the former case completion is effected by payment into Court of the amount named in the particulars of claim, and in the latter by an application to the Court to stay the action on the terms agreed.

Similar procedure must be followed when a payment arising out of the death of the husband and father, is made to a widow with children. Scottish procedure does not necessarily require the approval of the Court or payment into Court in minor's cases.

CHAPTER XIV

STATUTORY RETURNS, STATISTICS, RESERVES FOR OUTSTANDING CLAIMS

THE statutory returns required in connection with the classes of business dealt with in this book are those laid down by the Assurance Companies Acts, 1909 to 1946, and the Road Traffic Act, 1930. These returns consist of Revenue Accounts and Statement of Claims paid and outstanding.

A separate Revenue Account has to be made for personal accident and for motor. The other classes (third party, drivers, live stock, burglary, plate glass, and property owners' indemnity) are included in the General Account.

The only class out of those dealt with in this book in respect of which a Statement of Claims paid and outstanding has to be made, is personal accident.

The preparation of the Revenue Accounts does not specially concern the claims department, however much they may be responsible for the balance being on the right side. The Statement of Claims is peculiarly their concern.

Sect. 32 of the Assurance Companies Act, 1909, provides that "The company shall annually prepare a statement of its accident insurance business in the form set forth in the Fourth Schedule to this Act and applicable to accident insurance business and the statement shall be printed signed and deposited at the Board of Trade in accordance with section seven of this Act."

Sect. 7 provides that the statement shall be printed and four copies thereof, one of which shall be signed by the chairman and two directors of the company and by the principal officer of the company and if the company has a managing director by the managing director, shall (together with the other returns required by the Act) be deposited at the Board of Trade within six months after the close of the period to which the statement relates. Provided that if in any case it is made to appear to the Board of Trade that the circumstances are such that a longer period than six months should be allowed, the Board may extend that period by such period not exceeding three months as they think fit.

The Board of Trade is to consider *inter alia* such statement, and if any such statement appears to the Board to be inaccurate or

incomplete in any respect the Board shall communicate with the company with a view to the correction of any such inaccuracies and the supply of deficiences.

The forms set out in the Fourth Schedule are as follow—

Form applicable to Accident Insurance Business

STATEMENT of the ESTIMATED LIABILITY in respect of OUTSTANDING CLAIMS arising in the year of Account, and in the preceding year or years; computed as at the end of the year in which the claims arose, and as at the end of the year of Account; with particulars as to the number and amount of the claims actually paid in the intervening period.

I.—Claims arising during the year of account ending 19 .

(*a*) Particulars as to Claims arising, and settled, during the year of account :—

Class of Claim (1)	No. of Claims (2)	Total amount paid	
		By Sums insured (3)	By Weekly Allowance (4)
(i) Fatal claims - -			
(ii) Non-fatal claims -			
Totals - -			

(*b*) Particulars as to Claims arising during and outstanding at the end of the year of account :—

Class of Claim (1)	No. of Claims (2)	Amount paid during Year of Account (3)	Estimated Liability (4)
(i) Fatal claims - - - -			
(ii) Non-fatal claims, involving payment of sums insured.			
(iii) Non-fatal claims, involving payment of temporary weekly allowances :— With maximum duration, not exceeding 26 weeks. With maximum duration exceeding 26 weeks, but not exceeding 52 weeks. And so on, at intervals of 26 weeks, up to the longest period over which temporary weekly allowances are granted.			
(iv) Non-fatal claims, involving payment of yearly allowances during permanent total disablement.			
Totals - - - -			

II.—Outstanding Claims which arose during the *first year* preceding the year of account, ending 19 .

Particulars of Claims (1)	Estimated Liability in respect of Claims Outstanding as at the above Date (2)		Claims paid during the Period of One Year between the above Date and the End of Year of Account				Estimated Liability in respect of Claims Outstanding as at the End of Year of Account (5)		Totals of Columns (3), (4), and (5). (6)	
			Terminated within such Period (3)		Not terminated within such Period (4)					
	No.	Amount	No	Amount	No.	Amount	No.	Amount	No.	Amount
(i) Fatal claims - -										
(ii) Non-fatal claims, involving payment of sums insured.										
(iii) Non-fatal claims, involving payment of temporary weekly allowances :—										
With maximum duration not exceeding 26 weeks.										
With maximum duration exceeding 26 weeks, but not exceeding 52 weeks.										
And so on, at intervals of 26 weeks, up to the longest period over which temporary weekly allowances are granted.										
(iv) Non-fatal claims, involving payment of yearly allowances during permanent total disablement.										
Totals - -										

NOTE.—If temporary weekly allowances are granted by the Company for periods exceeding 52 weeks, particulars are to be furnished, in a form or forms similar to II. above, showing, in respect of claims involving such extended allowances, the estimated liability as at the end of the year in which such claims arose, and as at the end of the year of account; and the number and amount of such actual claims paid during the intervening period of two (or more) years; distinguishing claims terminated, and not terminated, within such period.

III.—Summary of estimated liability, in respect of claims outstanding as at the end of the year of account—

As per column (4) of Statement I. (*b*) - -	£
„ „ (5) „ „ II. - -	
„ „ (5) of further schedules in the form of Statement II. (if required).	
In respect of yearly allowances during permanent total disablement, outstanding at the end of the year of account, but not included in the above Statements - -	
Total estimated liability, in respect of outstanding claims as at the end of the year of account, as per First Schedule (C.) -	£

The forms themselves are self-explanatory and require no comment. The only question is, how is the necessary information to be compiled ?

There are two methods.

(1) By means of cards which are punched, sorted and totalled by machines.

(2) By means of books or sheets.

Where the business is of any magnitude the number of claims makes it imperative to use a mechanical system, but as in the case of personal accident the forms are very simple and the claims do not, in the usual way, remain outstanding for any length of time, such an elaborate system is not always necessary, and the work can be done manually, the main facts being extracted from the lists of outstanding claims prepared at the close of the year.

The return applies to world wide business and is not restricted to home business.

The Sixth Schedule provides the following rule for valuing a periodical payment: " The present value of a periodical payment shall in the case of total permanent incapacity be such an amount as would, if invested in the purchase of a life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity equal to seventy-five per centum of the annual value of the periodical payment and in any other case shall be such proportion of such amount as may, under the circumstances of the case, be proper."

Quite apart from the fact that they are needed in order to compile the Statutory Returns, statistics have to be kept in every department of insurance. Without them it would be impossible to calculate the premium rates, and the problem is how to ensure that adequate and reliable statistics shall be readily available.

These statistics may relate to individual risks or to classes. As regards the experience of individual risks there is little that need be said. It is a question of totalling the claims arising under a particular insurance, and in certain cases it may be necessary to divide the claims according to the various sections if the policy is one covering various risks.

These individual experiences, however, are in addition to the general statistics and not in substitution therefor.

In view of the numerous items which have to be dealt with (except, perhaps, in the fidelity guarantee section) it is necessary to provide some mechanical means of doing the work. It would be far too expensive and too slow to do the work manually.

The method generally adopted is that of the Hollerith or Powers Samas machine. A card is punched in respect of each claim. These cards can then be sorted in any way desired (within the limits of the information on the card) and the required figures produced. It is not an economical proposition to attempt to punch the cards direct from the claim papers, and it is better to write the facts on a card ruled in a similar way to the card which is punched. This work is usually done by the sections which are familar with the cases and when prepared these preliminary cards are sent to the Statistical department where the punching of the cards, which is then a routine job, is done by girls very rapidly. This is, in a sense, doing the job twice over, but it would be quite impossible for a girl sitting at a punching machine to wade through a file of papers to find the necessary data.

The problem is to decide what is to be put on the card. Obviously there is a limit to what can be recorded on the card, but every essential fact must be recorded. It is the preparation of the " field," as it is termed, that is so important.

The matter is simplified when the business is governed by a tariff, for it is the adequacy or otherwise of the tariff rates that is to be ascertained, and therefore the information required is such as will show the experience of the various tariff classes. In cases where the business is not subject to tariff, then the field can be arranged to meet the requirements of the particular office.

The position is, therefore, that so far as motor, live stock, and drivers are concerned the card must be drawn up so as to enable the office to furnish the necessary experience of its risks as classified by the tariffs ruling for those classes.

As regards personal accident, the endeavour will be to produce such figures as will show the experience under the various sections of the policy—Fatals, P.T.D., P.P.D., T.T.D., T.P.D., and the experience of specified diseases and all sickness. Probably one card

would not give room for more than this plus the occupation classification.

It would be instructive if the experience could be taken out by occupations and not merely by classes, and there are many other details which would be both instructive and interesting, but so long as insurance is conducted upon a commercial basis there is a limit to the amount of the policy-holder's money which the company is entitled to spend on these refinements.

In burglary the location of the risk is an important factor and should find a place in the field. How closely these can be sub-divided depends upon the space available.

In plate glass it is the location and class of trade which are important.

In addition the company will doubtless wish to be able to take out the experience of the various branches. This can be provided for, but it means taking up a couple of columns on the card if the number of branches is under 100. The problem is what to leave out.

The student is strongly recommended to study the cards used in his own office. It would be confusing to give a specimen here.

The fixing of the estimates for the outstanding claims is probably the most anxious task that falls to the lot of the claims man. On the correctness of these reserves, the usefulness and reliability of the statistics depends, and in fact so does the solvency of the company.

To underestimate the outstandings is the easiest way to cover up an underwriting loss, and it has been the road which more than one company has taken to insolvency.

While it is easy to under-estimate, it is equally easy and equally wrong to over-estimate; the ideal is to arrive at such a figure as fairly represents the liability.

To under-estimate is to inflate the profit, while to over-estimate is to deflate the profit, a proceeding which would not appeal to the Income Tax Authorities. The shareholders have also to be considered; they are entitled to the profits of each particular year. They should not be deprived of them in order to pile up the profits for future generations, neither are they entitled to inflated profits due to the inadequacy of the reserve for outstandings. At the same time there are enough hidden dangers in claims to make it very difficult to offend against the canons of adequate estimates.

There are two methods of arriving at the reserve—

(1) Individual estimates.

(2) Average cost.

The first method is to estimate the value of each claim separately, and is the method most commonly used. The second method is to calculate the average cost of claims of this class over a number of

years and apply that figure to the number of claims outstanding. There are objections to the average cost method. In the first place the average cost may not be reliable unless it is calculated over a very large number of claims. There is probably no class other than workmen's compensation which would provide a sufficient number of claims to give a reliable average. In other classes the relative smallness of the numbers, and the disturbing effect of one or two serious claims, make it difficult to obtain a sufficiently wide and uniform basis on which to form an average. Further the claims for the current year to which you are applying the average may include one or two particularly heavy claims, and the average cost basis would hardly provide an adequate figure unless the number of claims is so great as to take care of a calamity.

Experience of average costs shows that there is a rise in the figure each year—not necessarily a regular rise, but a distinct upward trend each year over the last. It follows, therefore, that you cannot take the average cost as shown but must load it, and this introduces an element of guess work which is undesirable. It will be appreciated that the average cost for the more recent years must of necessity contain a good deal of estimates. It is not until the claims have run off that you get a true average cost, and by that time we know that claims are costing more as the recent years will show when they have run off.

As the number of claims to be handled is not unmanageable, there is no reason for adopting other than a method of individual estimates, but the average cost, properly loaded to provide for the yearly increase, is a very useful check figure. It would be a wise rule to make that, whatever the individual estimates came out at, the figure reserved should not be less than that produced on an average cost basis.

The difficulties of estimating are greater in some sections than in others. In personal accident there are policy limits which provide a ceiling. The weekly disablement benefits are limited to so many weeks.

In burglary you are not likely to pay more than the amount claimed, so that it is easy to fix a figure which will cover the cost.

It is when you come to motor, third party, and drivers, where court proceedings are involved, that the matter becomes difficult. The only way is to play for safety. Estimate on the basis of losing the action and disregard the chance of recovery. It is in a sense wrong. It is not really trying to estimate the chances of the particular claim, but merely estimating what it will cost at the worst. All the same it is not merely wise but necessary to do this, for experience will have taught you that lurking among the claims are probably one

or two which, though they look quite small and straightforward at the moment, will turn sour and cost a considerable sum.

Having totalled the individual estimates, there are still one or two items to be considered and for which something should be added.

Unadvised claims. Though the list of outstandings has been kept open for some days after the close of the year, there are sure to be many claims of which the company has not yet heard. The delay in advising them may be due to quite good reasons and they could not be repudiated even if out of date according to the policy. These belong to the year's trading and should be provided for.

Reopened Claims. There is always the possibility of having to reopen a case which has been settled, and perhaps no binding discharge obtained, and there are the numerous cases which are put away (either after or without payment) in the hope that nothing more will be heard of them. Some of them will inevitably develop into claims, possibly of a serious nature. Provision must be made for these.

Contingencies. There must also be added some amount to provide for contingencies. It is useless to try to enumerate what contingencies might happen. When a company is carrying thousands of open claims depending upon all sorts of factors (the price of materials, the recuperative powers of the human body, the illness of animals, the result of litigation, and so on) and estimates to cost many thousands of pounds, there is always an unknown to be provided for.

Plate Glass Guarantees for Replacements. These should be included in the plate glass estimate individually or, as is usually done, by a lump sum addition. Very often these cases are not heard of again, but they may crop up years afterwards. Companies usually file the papers away and reserve in the form of a lump sum.

Reserves should be net, that is less reassurances and other recoveries. While it is perfectly safe to count on reinsurance recoveries, the same can hardly be said for other recoveries from the insured, third parties and defaulters. It is wiser not to anticipate them, and they are best left out of account.

The calculation of the reserve for the outstandings is probably the most difficult task in the year's work.

CHAPTER XV

THE PROCEDURE IN AN ACTION FOR TORT

CLAIMS men who deal with claims for personal injuries which result in an action for damages will find it useful to have some slight acquaintance with the procedure of a civil action. A brief outline of the procedure is therefore given here. How brief and inadequate it is will be appreciated when it is realized that the *Annual Practice*, or the White Book, as it is commonly termed, consists of some 3,000 pages.

The practice is laid down by Orders of the Supreme Court and Rules made under those Orders by a Rule Committee.

The first step in an action claiming damages for personal injuries caused by negligence is for the plaintiff's solicitor to issue a writ. He may do this either at the Central Office at the Royal Courts of Justice, London, or at one of the District Registries.

The plaintiff's solicitor prepares the writ in duplicate. One copy is sealed and becomes the original writ. The other copy is retained by the Court.

A copy of this writ is then served upon the defendant personally or a solicitor can accept service for him.

After service the original writ is endorsed by the person who served it with the date, place and mode of service.

Where the defendant's solicitor accepts service on behalf of the defendant he endorses the original writ as follows—

"I accept service on behalf of the defendant and undertake to enter appearance thereto," adding his signature and the date.

A writ may be served at any time within twelve months of issue. If the defendants are a firm, service may be made on one of the partners personally, or at the firm's principal place of business on the manager or person in charge, together with a notice that he is so served. If the defendants are a limited company service may be made by leaving the copy of the writ at or sending it by post in a prepaid envelope addressed to the company at its registered office. Service may also be effected in such other manner as the Court may direct.

The issue of the writ is the commencement of proceedings even though it is not served. It is well, therefore, not to be too emphatic that time limited for taking proceedings under certain statutes has

expired until it is ascertained whether a writ has been issued but for some reason not served.

The defendant or his solicitor must enter an appearance within eight days of the service of the writ inclusive of the day of service. This is a short formal document. If the writ is issued out of the Central Office, appearance must be entered there. If the writ is issued out of a District Registry, appearance must be entered in that Registry if the defendant resides or carries on business within the district of the Registry. If he does not reside or carry on business within the district, he may enter Appearance at the District Registry or at the Central Office.

If a defendant fails to enter Appearance he runs the risk of Interlocutory judgment being signed against him and the action proceeding to trial as to the amount of damages only. The judgment could be set aside upon the defendant's solicitor taking out a summons and showing to the satisfaction of the Court reasonable cause why appearance had not been entered.

The Statement of Claim can be delivered with the Writ or within ten days after appearance. This document is usually settled by counsel. In an action for damages for negligence it sets out the main facts of the accident, the details of the negligence alleged against the defendant, the nature and extent of the injuries suffered by the plaintiff, and details of the special damages, and finally claims damages.

If the defendant is not satisfied with the particulars of the alleged negligence or injuries or the items of special damage as set out in the Statement of Claim—if for instance they are not sufficiently explicit—he may apply to the plaintiff's solicitor for further and better particulars thereof. If he fails to comply therewith, then the defendant's solicitor may issue a summons upon the hearing of which the Court may make an Order that the plaintiff give such further and better particulars as it considers right and proper or refuse to make an Order if the request of the defendant is considered unreasonable.

In reply to the Statement of Claim the defendant delivers a Statement of Defence. This must be delivered within fourteen days from the time limited for appearance or from the delivery of the Statement of Claim, whichever is the later date. This document is also usually settled by counsel. It usually denies each and every allegation of negligence and the injuries and loss alleged in the Statement of Claim. If negligence is alleged against the plaintiff the defendant must plead it in his Defence and set out in detail the negligence alleged. The defendant may also plead that the accident was due to the negligence of a third party, in which case he must give full particulars of his name and address and must set out in detail the negligence alleged.

The plaintiff, upon receiving the Defence pleading that the accident was due to the negligence of a third party, may amend the proceedings by adding the third party as a defendant. If he fails to do so the defendant may issue a Third Party notice joining the third party in the proceedings. The third party must enter Appearance thereto and deliver his Defence in the same manner as the defendant in the original proceedings.

In the event of the defendant having sustained injuries or loss as a result of the accident and desiring to claim therefor, he may do so by including a counter-claim in his Defence pleading that the accident was caused by the negligence of the plaintiff, and setting out in detail the negligence alleged against him, the nature and extent of the injuries or loss sustained, details of the special damage, and finally claiming damages. This document is called Defence and Counter-claim.

The plaintiff then delivers a document called Defence to Counter-claim in which he denies each and every allegation of negligence, injuries and loss contained in the Counter-claim.

In certain cases, for example where a third party has been seriously injured and remembers nothing about the accident, or a third party has been killed and the plaintiff's solicitor has not been able to trace any witnesses he may issue a summons for leave to administer interrogatories to the defendant, attaching thereto the interrogatories he desires answering.

At the hearing of the summons the solicitors for both parties attend, and the Court settles the form which such interrogatories as are allowed are to take, and fixes the time when the answers, which must be made by affidavit, shall be filed.

On occasion an action is commenced in the High Court where the injuries sustained are not so serious as to warrant the expense involved in a trial in the High Court but might more properly be tried in the County Court. In such a case, where it appears that the plaintiff has no visible means of paying the costs of the defendant in the event of a verdict being given in the defendant's favour, the defendant's solicitor issues a summons in which he makes application for security for costs and files an affidavit to the effect that the plaintiff has no visible means, and, where defence has not then been delivered, that defendant has a good defence to the action. Plaintiff's solicitor may file an affidavit in reply. At the hearing of the summons, the solicitors on both sides appear before the Court. If the application is successful an Order will be made to the effect that unless the plaintiff deposits in Court a sum of money, usually £30, as security for costs within a specified time, usually 10 days, the action will be transferred to the County Court. If the plaintiff deposits in Court

the amount stated within the time ordered then the action remains in the High Court. If he fails to do so the action is transferred to the County Court.

In cases where it is clear that the defendant can have no defence at all or a doubtful defence on the issue of liability, whilst he might be anxious to settle the claim it is not infrequently found that the plaintiff's view as to what is a reasonable sum for compensation is so far removed from the view of the defendant that the action must be proceeded with even on the question of damages only.

Where it is clear that the defendant can have no defence at all, or where there is a doubtful defence, he may make a payment into Court at any time after Appearance, denying the injuries, loss and damage, of such a sum as he considers is adequate compensation to the plaintiff in order to avoid the unnecessary expenditure of costs on the issue of liability.

Notice of the payment into Court must be served upon the plaintiff's solicitor.

The plaintiff must accept the sum paid into Court within seven days. If he fails so to do the action proceeds to trial, but it is of course always open to the defendant to agree to the sum being taken out in settlement even after the seven days have expired.

In the event of the amount awarded to the plaintiff at the trial not exceeding the amount paid into Court the plaintiff may lose his own costs incurred after the payment into Court and have to pay the defendant's costs on the issue of damages from the time of such payment into Court. The question of costs, however, is always in the discretion of the Judge. Such costs will be material, because the real expense of an action does not assume serious proportions until after pleadings are closed.

It will be realized, therefore, that the right which the defendant has of making a payment into Court is often the means of the plaintiff accepting a reasonable amount where but for this facility, the defendant would be powerless to prevent an unreasonable plaintiff proceeding to trial and incurring heavy expenditure, all of which would fall upon the defendant.

Within seven days after delivery of the Defence the plaintiff's solicitor issues a summons for Directions which fixes a date on which the solicitors for both parties are to appear before the Court. An order is thereupon made as to the mode of trial, that is to say, trial by Judge and jury or by Judge alone, the place of the trial, and deals with other subsiduary matters such as the number of medical witnesses, agreed plans, and so on.

A copy of this Order must be served by the plaintiff's solicitor upon the defendant's solicitor.

The plaintiff's solicitor then serves upon the defendant's solicitor Notice of Trial, which he may do at any time after the Order for Directions has been made. If he does not do so within six weeks, the defendant may either give notice of trial or apply to dismiss for want of prosecution, though this latter course is generally inadvisable since it is likely to cause the action to be revived. After the plaintiff has given notice of trial he must set the action down for trial. If the case is to be heard at an Assize it must be set down not later than seven days before the Assize commences.

There is a modified procedure as to Notice of Trial and setting down for trial in London, Middlesex, Manchester, and Liverpool, but elsewhere the procedure is uniform.

In due course the case appears in the list and comes on for hearing. At the present time the hearing will be by Judge alone. Counsel for the plaintiff outlines his case and then calls the plaintiff. The plaintiff is examined by his counsel and cross-examined by counsel for the defendant. If necessary he is re-examined by his counsel to clear up any point that may have arisen in cross-examination. The plaintiff's witnesses are then called, examined, cross-examined and, if necessary re-examined.

The defendant's counsel then opens his case and calls the defendant and his witnesses. He examines them and they are cross-examined by the counsel for the plaintiff and, if necessary, re-examined by the defendant's counsel. The Judge takes a note of all this evidence. After speeches by counsel the Judge delivers his judgment.

In accident cases the County Court has jurisdiction where the damages claimed do not exceed £200, but if the claim exceeds £100 the defendant can have the action transferred to the High Court if he objects to trial in the County Court. If the parties so desire they can agree that the jurisdiction of the Court shall not be limited to £200.

Proceedings in the County Court are commenced by the issue of a summons. Particulars of the claim must be attached to the summons, setting out the facts relating to the accident, details of the negligence alleged against the defendant, the injuries sustained by the plaintiff and details of the special damage. The Summons must be served on the defendant personally or left with some person not less than sixteen years of age at the residence of the defendant or, where he is the proprietor of a business at his place of business. A Defence must be filed within eight days of the service of the Summons.

The hearing in the County Court follows the same lines as that of the High Court.

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